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NOTES

BIRTH OF A NEW AGE: A COMPREHENSIVE REVIEW OF NEW YORK INHERITANCE LAW RESPONDING TO ADVANCES IN REPRODUCTIVE TECHNOLOGY

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INTRODUCTION

Notwithstanding theories of creationism, it can be said that human reproduction has always required sexual intercourse between a man and a woman.¹ Throughout history, humans—especially females—have attempted to control their own fertility by ascribing to cultural practices, ingesting herbal supplements, and even summoning the graces of powerful

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¹ See Michael Kirby, *Medical Technology and New Frontiers of Family Law*, in LEGAL ISSUES IN HUMAN REPRODUCTION 3, 4 (Sheila McLean ed., 1989) (finding that the normal method of human conception has been through sexual intercourse); see also Ben Schuman, Note, *Gods & Gays: Analyzing the Same-Sex Marriage Debate from a Religious Perspective*, 96 GEO. L.J. 2103, 2111 (2008) (stating that “as [men and women] mate . . . [they] fulfill the behavioral conditions of reproduction, or, if you will, perform the type of act – the only type of act – upon which the gift of a child may supervene”).

fertility deities.² Today, modern science has equipped women with a set of new, and perhaps more reliable, tools for controlling their fertility.³ Some scholars who recognized advances in contraception as having introduced sex without reproduction, now recognize these advances in reproductive technologies as having introduced reproduction without sex.⁴ In the United States, where infertility is an increasing problem,⁵ advances in reproductive technologies stand as a new beacon of hope in the quest for conception.⁶

Roughly fifteen percent of the U.S. population that is of reproductive age is infertile.⁷ Assisted Reproductive Technologies (ARTs) have created a multitude of reproduction options both for members of this challenged class and for fertile individuals who rely on the procedures for other reasons.⁸ Human conception was initially refined by technology with the

² See Linda M. Whiteford & Marilyn L. Poland, *Introduction to NEW APPROACHES TO HUMAN REPRODUCTIVE TECHNOLOGIES* 1, 1 (Linda M. Whiteford & Marilyn L. Poland eds., 1989) (stating that for thousands of years, women have controlled their fertility through cultural practices and supernatural means); see also RACHEL KRANZ, *REPRODUCTIVE RIGHTS AND TECHNOLOGY* 26 (2002) (illustrating that midwives, folk wisdoms, and herbal remedies are used as ways of engendering wanted pregnancies).

³ See Whiteford & Poland, *supra* note 2, at 2 (describing that a shift towards medical technology will help control reproduction); see also Kirby, *supra* note 1, at 4 (noting that different advancements in medical technology have refined the term "conception").

⁴ See Whiteford & Poland, *supra* note 2, at 4 (finding that a separation between sex and reproduction creates new legal, ethical and social consequences); see also Rena M. Lindevaldsen, *Sacrificing Motherhood on the Altar of Political Correctness: Declaring a Legal Stranger To Be a Parent over the Objections of the Child's Biological Parent*, 21 REGENT U. L. REV. 1, 1 (2008–2009) (stating that prior to the advances in reproductive technologies, women who gave birth to a child were unequivocally the child's mother).

⁵ See John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, in *LEGAL AND ETHICAL ISSUES IN HUMAN REPRODUCTION* 6, 8 (Bonnie Steinbock ed., 2002) (stating that in 1983, more than one in eight American married couples had failed to conceive after one year of trying); see also KRANZ, *supra* note 2, at 51 (suggesting that the pressing problem of infertility will only increase as more women postpone childrearing to pursue their careers).

⁶ See Whiteford & Poland, *supra* note 2, at 4 (listing the different advances in reproductive technology); see also Joshua Kleinfeld, *Tort Law and In Vitro Fertilization: The Need for Legal Recognition of "Procreative Injury"*, 115 YALE L.J. 237, 244 (2005) (finding that *in vitro* fertilizations bring new hope to would-be parents).

⁷ Emily McAllister, *Defining the Parent-Child Relationship in an Age of Reproductive Technology: Implications for Inheritance*, 29 REAL PROP. PROB. & TR. J. 55, 56 (1994) (including this figure as an introduction to an account from men and women about the struggle of infertility); Kirby, *supra* note 1, at 4–5 (positing this percentage as an accepted estimate of the number of infertile married couples); see Laura D. Heard, *A Time To Be Born, A Time To Die: Alternative Reproduction and Texas Probate Law*, 17 ST. MARY'S L.J. 927, 931 (1986) (providing statistics for the number of individual men and women who face reproductive challenges; roughly one-fourth of America's men are functionally sterile, and twenty-seven percent of women of child-bearing age have physical problems that prevent them from procreating).

⁸ See Carl H. Coleman, *Assisted Reproductive Technologies and the Constitution*, 30 FORDHAM URB. L.J. 57, 57 (2002) (acknowledging that ARTs have expanded reproductive options for people without fertility problems by permitting women to have children without a partner of the opposite sex); see also Kirby, *supra* note 1, at 4 (recognizing the utility of reproductive technologies for homosexual partners who resort to the procedures in lieu of heterosexual intercourse); CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, *ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE* 8–10 (2006) [hereinafter KINDREGAN & MCBRIEN I] (outlining examples of "non-

introduction of artificial insemination (AI).⁹ Later advances, including *in vitro* fertilization (IVF) and cryopreservation, further refined the process of assisted reproduction.¹⁰ Today, the procreation process continues to evolve with the development of new technologies.¹¹

As new technologies continue to advance, our society must determine the appropriate degree of legal regulation of these procedures. Given the jarring divide between law and science and the significant social utility of reproductive technologies, some argue that government regulation of ARTs should be strictly limited.¹² On the other hand, given the extensive legal implications that surround many new reproductive technologies and the procedures they require, others argue in favor of governmental regulation.¹³ At the root of this debate lies the enigmatic fundamental right to procreation and the Supreme Court's interpretation of this principle.¹⁴ However, while that matter resounds within the halls of federal courts, several states have legislatively responded to matters that are incidental to

traditional families" relying upon assisted reproductive technologies in order to procreate).

⁹ See Kirby, *supra* note 1, at 5 (highlighting AI as the oldest technique to overcome infertility, and outlining the different types of AI); see also Kamran S. Moghissi, *The Technology of AID and Surrogacy*, in NEW APPROACHES TO HUMAN REPRODUCTION 117, 117 (Linda M. Whiteford & Marilyn L. Poland eds., 1989) (recounting the history of artificial insemination as having been first used in 1884 by John Hunter).

¹⁰ See Kirby, *supra* note 1, at 4–8 (observing the effect of individual advances in reproductive technology over the course of time); see also Kathryn Venturatos Lorio, *Conceiving the Inconceivable: Legal Recognition of the Posthumously Conceived Child*, 34 ACTEC J. 154, 154–55 (2008) (describing the historical development of artificial insemination to modern advancements).

¹¹ See KINDREGAN & MCBRIEN I, *supra* note 8, at 8 (discussing recent advances in reproductive technology including cryopreservation of embryos and sperm, and the application of cryopreservation in conjunction with artificial insemination, which he refers to as "intrauterine insemination"); see also McAllister, *supra* note 7, at 59–65 (outlining and describing several ARTs including the more modern technologies of cryopreservation and embryo transfer).

¹² Coleman, *supra* note 8, at 62 (referencing John Robertson, a leading commentator on the legal implication of ARTs, and his view that government efforts to regulate the procedures should be subject to "heightened judicial review"); see John A. Robertson, *Two Models of Human Cloning*, 27 HOFSTRA L. REV. 609, 619 (1999) (arguing that persons should have a presumptive right to pursue reproductive technologies, which should only be denied if there is a substantial harm from cloning to have genetically-related children).

¹³ Coleman, *supra* note 8, at 63–64. Coleman discusses Anne Massie's narrow view of a constitutional right to procreation based on that notion that ARTS "do not directly implicate the values . . . that are central to the privacy cases" in which a constitutional right to procreation has been recognized. *Id.* Coleman also reviews Radhika Rao's similar view of procreative liberty, which suggests that that the right extends only to reproductive activities "carried out exclusively between persons in close personal relationships." *Id.* See Lawrence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1108 (1990). A right to privacy does not protect the freedom of procreation but rather the freedom of intimate association. *Id.*

¹⁴ See HOWARD BALL, *THE SUPREME COURT IN THE INTIMATE LIVES OF AMERICANS: BIRTH, SEX, MARRIAGE, CHILDREARING, AND DEATH* 13–22 (2002) (illustrating the Supreme Court's assertions about the constitutional right to procreation through a discussion of several relevant Supreme Court cases); see also Coleman, *supra* note 8, at 62 (suggesting that if the use of ARTs is not entitled to any constitutional protection, the government will be able to regulate the procedures in any manner it chooses, which does not violate the constitution or statutes in general).

the use of ARTs.¹⁵

Considering the growing use of reproductive technologies as an alternative method of procreation, it seems appropriate for states to remove reproductive technologies from their "legal vacuum"¹⁶ by passing responsive legislation. In the case of inheritance laws, states have valid reasons for passing responsive legislation because reproductive technologies manipulate the "traditional human relationships" upon which the law is based.¹⁷ For example, several reproductive technologies introduce a third-party female into the procreation process and therefore challenge the "previously incontestable assumption of maternal affiliation" in inheritance law.¹⁸ Other legal implications of inheritance law arising out of reproductive technologies include inheritance eligibility of children conceived by reproductive technologies, finality of estates where sperm, ovum (egg), or embryos have been frozen, and ownership of preserved sperm, ovum, or embryos.¹⁹

New York statutory law has expressly addressed only the legitimacy of children conceived by AI.²⁰ However, New York courts have addressed several other inheritance issues arising out of reproductive technology,

¹⁵ See 15 INTERNATIONAL SURVEY OF LAWS ON ASSISTED REPRODUCTION 192–209 (Jan Stepan ed., 1990) [hereinafter INTERNATIONAL SURVEY OF LAWS] (listing state legislatures that have addressed issues surrounding reproductive technology); see also *In re Martin B.*, 841 N.Y.S.2d 207, 210 (Sur. Ct. 2007) (discussing the specific laws of Louisiana, California, and Florida that address the inheritance rights of post-conceived children).

¹⁶ John G. New, "Aren't You Lucky You Have Two Mamas?": *Redefining Parenthood in Light of Evolving Reproductive Technologies and Social Change*, 81 CHI.-KENT L. REV. 773, 779 (2006) (noting that IVF has posed problems for state courts in determining parentage, leaving questions of "parenthood, custody, and duties of support in a legal vacuum that courts must struggle to fill"); Heard, *supra* note 7, at 928 (citing Jürgen Neffe, *In Vitro Fertilization*, 315 NATURE 446, 446 (1985) (stating that *in vitro* is currently in a "legal vacuum")).

¹⁷ McAllister, *supra* note 7, at 58; see Heard, *supra* note 7, at 928–29 (arguing that reproductive technologies have created many unsolved issues in the area of estates and wills).

¹⁸ Heard, *supra* note 7, at 940 (noting that a child may be considered illegitimate for inheritance purposes if a reproductive procedure involves the contribution of a third party); see McAllister, *supra* note 7, at 58 (explaining that there may be more than two persons who are considered to be the parent when a third party is introduced into the assisted reproduction process).

¹⁹ Heard, *supra* note 7, at 928–29 (claiming that the difficulty of probating wills increases when embryo freezing increases the length of time in which posthumous children can be born); see Martha J. Stone, *Tick . . . Tick . . . Tick: As Biological Clocks Wind Down, the Laws Governing Inheritance and Parental Rights Issues Heat Up*, 43 S. TEX. L. REV. 233, 244 (2001) (stating that most issues involving ARTs addressed by courts involve inheritance and parental rights, including disagreements over the disposition of embryos).

²⁰ N.Y. DOM. REL. LAW § 73 (McKinney 2008) (explaining that a child conceived through artificial insemination "by persons duly authorized to practice medicine and with the consent in writing of the woman and her husband, shall be deemed the legitimate, birth child of the husband and wife for all purposes"); INTERNATIONAL SURVEY OF LAWS, *supra* note 15, at 203 (citing N.Y. DOM. REL. LAW § 73); McAllister, *supra* note 7, at 72–73 (recounting *Estate of Gordon*, 501 N.Y.S.2d 969 (Sur. Ct. 1986), which gave rise to § 73 as a case raising a question as to the inheritance rights of children conceived by artificial insemination).

including the legal status of a posthumously conceived child and her inheritance rights.²¹ This Note provides a comprehensive review of how advances in reproductive technology have shaped the legal landscape of New York's inheritance laws and highlights the areas of law that have not yet been addressed. The plethora of issues raised by these various reproductive technologies requires the New York Legislature to statutorily address each technology individually. The analysis consists of three parts. Part I provides an overview of several reproductive technologies and catalogues the ways each technology implicates inheritance law. Part II examines the ways that both New York case law and statutory law have responded to the legal implications of these technologies. Part III reviews the recommendations offered by the New York Task Force and the Advisory Committee to the Surrogate's Court, highlights issues that New York law has not yet addressed, and offers additional recommendations for legislative reform.

I. PILLARS COLLIDE: REPRODUCTIVE TECHNOLOGIES IMPLICATING LAW

A. *The Reproductive Technologies*

This section describes several reproductive technologies, but others have been omitted for the sake of brevity. The technologies discussed below are the most widely used technologies and are those that most seriously implicate inheritance law.

AI was the first reproductive technology used for human reproduction.²² As the oldest form of non-coital reproduction, the procedure does not involve sexual intercourse;²³ rather it involves the artificial injection of

²¹ See *Kass v. Kass*, 696 N.E.2d 174, 178 (N.Y. 1998) (holding that pre-zygotes are not recognized as persons for constitutional purposes, and therefore their disposition does not implicate a woman's fundamental right to privacy or bodily integrity); see also *In re Martin B.*, 841 N.Y.S.2d 207, 210 (Sur. Ct. 2007) (concluding that posthumously conceived children born by in vitro fertilization were "issue" and "descendants" for all trust purposes).

²² See KINDREGAN & MCBRIEN I, *supra* note 8, at 28–29 (suggesting that the AI procedure, originally used for animal husbandry, was adopted for human use as early as 1790); see also Anne McLaren, *Biological Aspects of A.I.D.*, in *LAW AND ETHICS OF A.I.D. AND EMBRYO TRANSFER* 3, 3 (Ciba Foundation Symposium ed. 1973) (describing the scientific process of artificial insemination and attributing its introduction to John Hunter).

²³ KINDREGAN & MCBRIEN I, *supra* note 8, at 29 (indicating that this procedure "was used for . . . human reproduction at least since 1790"); see Susan C. Stevenson-Popp, "*I Have Loved You in My Dreams*": *Posthumous Reproduction and the Need for Change in the Uniform Parentage Act*, 52 CATH. U.L. REV. 727, 759 n.3 (2003) (highlighting that "[a]rtificial insemination is the oldest and most common form of assisted reproductive technology, as well as one of the easiest and least expensive techniques").

semen into a woman's reproductive tract.²⁴ The semen for the procedure can be obtained from either the woman's husband (AIH), from a donor (AID), or from both her husband and a donor (AIDH).²⁵ A donor providing semen for AI may be known or anonymous.²⁶

The first recorded success of human insemination was performed in 1790, when a British woman was inseminated with her husband's "seed."²⁷ However, the first human insemination by donor was not performed until nearly 100 years later, in the United States.²⁸ Since its inception, AI has become a pervasive practice. In the U.S. alone, between 6,000 and 20,000 children are conceived by AID each year.²⁹ Recent estimates suggest that in the U.S. approximately 500,000 children have been conceived through AI, most from donor sperm.³⁰

In addition to the impact AI has independently made on reproduction, it has also been implemented in other reproductive technologies including surrogacy and embryo transfer.³¹ Both surrogacy and embryo transfer require the fertilization of a woman's egg within her body. Surrogacy involves an arrangement between two women whereby the "surrogate" or

²⁴ Heard, *supra* note 7, at 931 (explaining the AI procedure); see *Artificial Bastards*, TIME, Feb. 26, 1945, available at <http://www.time.com/time/printout/0,8816,792012,00.html> (describing the use of a syringe for this the AI injection).

²⁵ Heard, *supra* note 7, at 932; ATHENA LIU, ARTIFICIAL REPRODUCTION AND REPRODUCTIVE RIGHTS 12 (1991). Liu refers to AIDH—the process of combining semen of a husband and a donor—as "confused artificial insemination" (CAI); Liu further explains that this technique is typically used when the husband is not completely sterile and also recognizes that it introduces a question of paternity. *Id.*

²⁶ KINDREGAN & MCBRIEN I, *supra* note 8, at 29 (noting that the names of each donor need not be divulged); see Sherri A. Jayson, Comment, "Loving Infertile Couple Seeks Woman Age 18-31 to Help Have Baby. \$6,500 Plus Expenses and a Gift": Should We Regulate the Use of Assisted Reproductive Technologies by Older Women?, 11 ALB. L.J. SCI. & TECH. 287, 291 (2001) (emphasizing that "the donor can either be a woman's husband . . . or an unknown donor").

²⁷ See LIU, *supra* note 25, at 8-9 (giving a general history of AI); see also *Artificial Bastards*, *supra* note 24 (explaining how AI was first accomplished in 1790).

²⁸ LIU, *supra* note 25, at 9 (noting the first AI performed in the U.S.); see Kristin E. Koehler, Comment, *Artificial Insemination: In the Child's Best Interest?*, 5 ALB. L.J. SCI. & TECH. 321, 334 (1996) (recognizing that "[i]n 1866, Dr. J. Marion Sims was the first to perform an artificial insemination on a woman" in the U.S.).

²⁹ Heard, *supra* note 7, at 933 (indicating how many children are conceived by AI each year); see Joan Heifetz Hollinger, *From Coitus to Commerce: Legal and Social Consequences of Noncoital Reproduction*, 18 U. MICH. J.L. REFORM 865, 871 (1985) (stating that the number of "children who are born each year as a result of AID var[ies] from 6,000 to 20,000").

³⁰ Helene S. Shapo, *Matters of Life and Death: Inheritance Consequences of Reproductive Technologies*, 25 HOFSTRA L. REV. 1091, 1107 (1997) (noting the number of AI conceptions to date); Gregory A. Triber, *Growing Pains: Disputes Surrounding Human Reproductive Interests Stretch the Boundaries of Traditional Legal Concepts*, 23 SETON HALL LEGIS. J. 103, 140 n.15 (1998) (highlighting that "as many as 500,000 couples have used third-party donated gametes or preembryos to bear children").

³¹ See Heard, *supra* note 7, at 933 (providing a general discussion of reproductive technologies); see also Jayson, *supra* note 26, at 291 (illustrating that "[s]everal ART methods are currently available: artificial insemination, in vitro fertilization, cryogenic preservation, surrogacy, and fertility drugs").

“surrogate mother” carries a child for another woman.³² Typically, the surrogate agrees to being artificially inseminated with a man’s sperm, to carry the child to term, and to allow the child to be subsequently adopted by the “intended mother” (the sperm donor’s wife or partner).³³ This form of surrogacy, in which the surrogate’s own egg is fertilized, is known as “traditional” surrogacy.³⁴ Advances in reproductive technology have also given rise to a new form of surrogacy known as “gestational surrogacy,” in which the surrogate’s egg is not used and she is therefore genetically unrelated to the child.³⁵

Embryo transfer similarly involves two women; however, in this procedure, after the donor woman’s egg is fertilized through AI using the intended father’s sperm, it is removed from her uterus and transferred into the womb of the intended mother, where it is carried to term.³⁶ Embryo transfer can also be used in conjunction with “embryo adoption” whereby a fertilized egg that is not genetically related to either intended parent is implanted in the womb of the intended mother and carried to term.³⁷ This process allows fertilization to occur outside of the intended mother’s body;

³² KINDREGAN & MCBRIEN I, *supra* note 8, at 129 (defining a “surrogate” in the context of reproductive technologies as a “woman who agrees to serve as the birth mother to have a child for another person or couple, whether or not she is the genetic mother, and whether or not she does so for compensation”); WARREN FREEDMAN, *LEGAL ISSUES IN BIOTECHNOLOGY AND HUMAN REPRODUCTION: ARTIFICIAL CONCEPTION AND MODERN GENETICS* 6 (1991) (suggesting that the word “surrogate” meaning “substitute” may not be appropriate for the process, in which the surrogate mother bears and gives birth to the child through IVF or embryo transfer).

³³ Heard, *supra* note 7, at 933 (highlighting that “[u]sually the surrogate mother agrees to be artificially inseminated with a man’s sperm, and soon after birth, the child is adopted by the sperm donor’s wife”); KINDREGAN & MCBRIEN I, *supra* note 8, at 131 (emphasizing that the surrogate, as “standard protocol,” agrees “to surrender any resulting child for adoption after its birth”).

³⁴ KINDREGAN & MCBRIEN I, *supra* note 8, at 129 (defining traditional surrogacy); Heather Weller, *Traditional versus Gestational Surrogacy*, CHILDBIRTH SOLUTIONS, <http://www.childbirthsolutions.com/articles/preconception/surrogacy/index.php> (last visited May 10, 2009) (discussing the difference between traditional surrogacy and gestational surrogacy).

³⁵ KINDREGAN & MCBRIEN I, *supra* note 8, at 129–30, 132–33 (indicating that “[g]estational surrogacy” is sometimes referred to as “IVF surrogacy” because it employs *in vitro* fertilization; the procedure involves the implantation of a complete embryo into the surrogate’s womb, instead of the artificial fertilization of her own egg); Weller, *supra* note 34 (discussing the process of gestational surrogacy as well as its benefits and drawbacks).

³⁶ See Heard, *supra* note 7, at 934 (outlining two circumstances in which this type of embryo transfer is used: (1) when a woman cannot produce eggs, but can carry a fetus, she may reproduce by “prenatal adoption of a donated embryo,” or (2) when a woman can produce eggs, but cannot carry a fetus to term, she may reproduce by transferring her embryo to the womb of a “surrogate mother”); see also American Pregnancy Association: Embryo Transfer, <http://www.americanpregnancy.org/infertility/embryotransfer.html> (last visited May 10, 2009) (stating that “embryos are generally transferred back to the woman’s uterus at the two – eight cell stage, which occurs 48 – 72 hours after the retrieval”).

³⁷ FREEDMAN, *supra* note 32, at 5 (noting that in this procedure a third-party woman is inseminated with donor sperm, and once the egg is fertilized it is removed and implanted into the womb of the intended mother for gestation and birth). See generally Embryo Adoption, <http://adopting.adoption.com/child/embryo-adoption.html> (last visited May 10, 2009) (defining the process of embryo adoption).

however, the alternative environment that is employed for fertilization here is still a human body.³⁸

In 1969, two British doctors successfully united a human egg and sperm, entirely outside the body, and thus completed the first human *in vitro* fertilization (IVF).³⁹ However, the first successful human birth resulting from IVF did not occur until nearly ten years later in 1978.⁴⁰ To achieve conception through this procedure, the externally fertilized egg must be transferred into a woman's uterus, and the embryo must be successfully implanted into the uterine walls.⁴¹ Though IVF requires meticulous timing and chemical balancing, it has proven to be a fruitful alternative to traditional procreation.⁴² Indeed, since the birth of the first "test-tube baby,"⁴³ IVF has developed into a viable option for reproduction.⁴⁴

In the U.S. in 1987, more than 1200 children were conceived by IVF, and the statistic worldwide presently exceeds 3000.⁴⁵ With the IVF procedure becoming more advanced and its accessibility increasing, its success rate is only expected to rise.⁴⁶ Additionally, the advances of other

³⁸ KINDREGAN & MCBRIEN I, *supra* note 8, at 82 (outlining the differences between various reproductive technologies, including embryo transfer and *in vitro* fertilization). See generally Embryo Adoption, *supra* note 37 (explaining that this process is chosen by women who want to experience childbirth).

³⁹ ANDREA L. BONNICKSEN, IN VITRO FERTILIZATION: BUILDING POLICY FROM LABORATORIES TO LEGISLATURES 13 (1989) (attributing the first scientifically reported results of *in vitro* fertilization to Robert Edwards and Patrick Steptoe); JENNIFER GUNNING & VERONICA ENGLISH, HUMAN IN VITRO FERTILIZATION: A CASE STUDY IN THE REGULATION OF MEDICAL INNOVATION 3-4 (1993) (recounting Edwards' role in developing the procedure for human IVF and the partnership that developed between Edwards and Steptoe).

⁴⁰ BONNICKSEN, *supra* note 39, at 17 (highlighting that "the first ongoing pregnancy from an external fertilization" did not occur until 1978); Heard, *supra* note 7, at 935 (noting that "the first successful 'test-tube baby' was born in England on July 25, 1978").

⁴¹ See McAllister, *supra* note 7, at 60 (explaining that the embryo is typically transferred to the uterus at the two to sixteen cell stage); see also LIU, *supra* note 25, at 13 (detailing the procedure).

⁴² See Heard, *supra* note 7, at 934-35 (highlighting that since the inception of IVF, more than one thousand babies have been born using this process). See generally KRANZ, *supra* note 2, at 39-40 (emphasizing that "[a] woman might be impregnated with an embryo one year, and then later, when she was ready for a second child, be impregnated with another embryo").

⁴³ See Heard, *supra* note 7, at 935 (noting the term used to describe a child conceived through *in vitro* fertilization, referring to the procedure of fertilizing the egg outside the body in a Petri-dish or "test-tube"); see also McAllister, *supra* note 7, at 60 (indicating that the "first 'test-tube baby' resulting from successful IVF . . . was born in England"); FREEDMAN, *supra* note 33, at 3 (suggesting that the complicated medical procedure required in IVF prohibited the technology from being as popular as it was originally expected to be).

⁴⁴ As sperm banks grew into a profitable business in the 1980s, IVF procedures were used with increasing frequency. KRANZ, *supra* note 2, at 39-40. "In vitro fertilization is now offered by 175 clinics in the United States, and is practiced worldwide." Heard, *supra* note 7, at 935-36.

⁴⁵ See McAllister, *supra* note 7, at 60 (providing a general discussion of IVF); see also Heard, *supra* note 7, at 935 (asserting that more than one thousand children have been born by IVF since the first one was born in 1978).

⁴⁶ See ROBERT H. BLANK, REGULATING REPRODUCTION 65 (1990) (reporting on the success rates of various reproductive technologies, including IVF); see also Mary Patricia Byrn, *From Right to*

techniques that incorporate IVF have expanded the potential success of the procedure.⁴⁷

Cryopreservation is a more recent technology that not only incorporates IVF but also is incorporated in IVF. The technology allows for the storage and preservation of reproductive material through cryogenic freezing.⁴⁸ The process has routinely been used for the storage of sperm and embryos; however, the field has recently experimented with cryopreservation of unfertilized eggs.⁴⁹ Cryopreserved gametes (sperm and eggs) can be used in IVF to produce embryos.⁵⁰ Conversely, embryos created through IVF can be sustained by cryopreservation and can be implanted into a woman's womb at a later time.⁵¹ The ability to collect reproductive material and delay conception until a much later date provides an array of advantages that may improve the success rate of IVF.⁵² However, the advantage offered by cryopreservation that most seriously implicates inheritance law is the potential for posthumous conception of children.⁵³

Wrong: A Critique of the 2000 Uniform Parentage Act, 16 UCLA WOMEN'S L.J. 163, 174–75 (2007) (noting a dramatic increase in the success rate and number of children born through the use of IVF).

⁴⁷ See KINDREGAN & MCBRIEN I, *supra* note 8, at 82–84 (distinguishing similar ARTs from IVF); see also KRANZ, *supra* note 2, at 23–24 (outlining the various analogous technologies that exist compared to IVF).

⁴⁸ See KINDREGAN & MCBRIEN I, *supra* note 8, at 84 (giving a general description of cryopreservation); see also McAllister, *supra* note 7, at 59 (explaining that semen can be frozen for use in reproductive procedures).

⁴⁹ See KINDREGAN & MCBRIEN I, *supra* note 8, at 84 (explaining that cryopreservation of unfertilized eggs is still experimental); see also Keith L. Harrison et al., *Oocyte Cryopreservation as an Adjunct to the Assisted Reproductive Technologies*, 2007 MED. J. AUSTL. 186, 379 (reporting successful use of oocyte—or unfertilized egg—cryopreservation in IVF procedures).

⁵⁰ See Charles P. Kindregan, Jr. & Maureen McBrien, *Posthumous Reproduction*, 39 FAM. L.Q. 579, 580 (2005) [hereinafter Kindregan & McBrien II] (discussing the potential for posthumous conception, growing out of cryopreservation of ovum, sperm, and embryos); see also McAllister, *supra* note 7, at 63 (stating that eggs and sperm can be frozen similarly to embryo cryopreservation).

⁵¹ See KINDREGAN & MCBRIEN I, *supra* note 8, at 85 (presenting cryopreservation as a technique for preserving embryos); see also Jill R. Gorny, *The Fate of Surplus Cryopreserved Embryos: What is the Superior Alternative for their Disposition?*, 37 SUFFOLK U. L. REV. 459, 463 (2004) (explaining that cryopreserved embryos may be stored for future use in IVF).

⁵² See KINDREGAN & MCBRIEN I, *supra* note 8, at 85 (indicating that the advantages of cryopreservation for IVF include: (1) embryos can be used during different cycles, thereby increasing the possibility of pregnancy, (2) the potential of multiple births will be decreased because the need to implant multiple eggs at once will be eliminated, and (3) doctors will have the time to screen embryos for disease before implantation); see also Gorny, *supra* note 51, at 463–64 (listing cost savings, emotional and physical benefits, and convenience as advantages of cryopreservation).

⁵³ Erica Howard-Potter, *Beyond Our Conception: A Look at Children Born Posthumously Through Reproductive Technology and New York Intestacy Law*, 14 BUFF. WOMEN'S L.J. 23, 24–26 (2005) (addressing the possibility of having a posthumous child through cryopreservation and the subsequent questions surrounding that child's inheritance); Kindregan & McBrien II, *supra* note 50, at 580–81 (asserting that new technologies, which allow posthumous conception, are giving rise to a new set of legal issues).

B. Inheritance Law Implications

This section outlines the implications that each previously discussed reproductive technology has on inheritance law. Because the implications are numerous, it may be helpful to consider them within the context of three main “umbrella” issues: (1) legal status of the child’s parent(s); (2) legal status of the child; and (3) legal status of the reproductive material.

The first of these categories concerns “legal parentage.”⁵⁴ Family law has defined three types of “parenthood,” including biological parenthood, legal parenthood, and social (or psychological) parenthood.⁵⁵ However, the relationship between a child and her legal parents establishes her inheritance rights.⁵⁶ The legal status of parents is relevant to determine the rightful heirs of an intestate estate and the rightful beneficiaries to testate estates and other gifts, including class gifts.⁵⁷ Before the introduction of reproductive technologies, a presumption of paternity applied when a child was born to a married woman,⁵⁸ and a presumption of maternity was standard.⁵⁹ Traditionally, the biological mother had always been the gestational mother (i.e., the woman who carried the child to term), and she was presumed to be the legal parent at the child’s birth.⁶⁰ However, with the advance of reproductive technologies, neither of these presumptions

⁵⁴ Shapo, *supra* note 30, at 1100 (noting that “legal parentage establishes inheritance rights”).

⁵⁵ *Id.* at 1096 (discussing three types of parenthood under family law); see Harry D. Krause & David D. Meyer, *American Law in a Time of Global Interdependence: U.S. National Reports to the XVIth International Congress of Comparative Law: Section II What Family for the 21st Century?*, 50 AM. J. COMP. L. 101, 114–15 (2002) (explaining the American Law Institute’s desire to include the category of “de facto parents”—another name for social or psychological parents—in the ALI Principles).

⁵⁶ Shapo, *supra* note 30, at 1100 (explaining that legal parentage ascertains inheritance rights); see UNIF. PROB. CODE § 2-114(a), 8 U.L.A. 91 (amended 1993) (stating that “for purposes of intestate succession by, through, or from a person, an individual is the child of his [or her] natural parents, regardless of their marital status”).

⁵⁷ Shapo, *supra* note 30, at 1110 (asserting that legal parentage establishes those who can take under intestate estates, family allowance statutes, and class gifts); see DOUGLAS J. CUSINE, NEW REPRODUCTIVE TECHNIQUES: A LEGAL PERSPECTIVE 59 (1988) (discussing how it is the child’s legal position which will determine whether the child has inheritance rights).

⁵⁸ Shapo, *supra* note 30, at 1009 (explaining that the Uniform Parentage Act (UPA) establishes a rebuttable presumption that a man is the natural father of a child if he is married or attempted to marry the mother); Marsha Garrison, *Law Making for Baby Making: An Interpretative Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 883 (2000) (stating that the marital presumption of legitimacy is the primary rule which governs the parentage of children born to a married woman).

⁵⁹ Shapo, *supra* note 30, at 1099–1100. The UPA reaffirms the common law assumption that the woman who gave birth to the child is its mother. *Id.* The European-American tradition identifies a child’s mother through the biological act of giving birth. Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 253 (1995).

⁶⁰ Shapo, *supra* note 30, at 1097 (reviewing the traditional conceptions about maternity and paternity that are challenged by modern reproductive technologies); see Roberts, *supra* note 59, at 253 (noting that common law held a woman was the legal mother of the child to whom she gave birth).

remains intact.⁶¹ The discussion below highlights the various ways different technologies challenge these presumptions.

The second category of legal implications concerns the legal status of the child as “legitimate” or “illegitimate,” which has historically been determined by the marital status of the child’s parents.⁶² This distinction—still held by many states—reflects the common law presumptions of paternity and maternity, under which a child born to married parents is legitimate and a child born to unmarried parents is illegitimate.⁶³ The legitimacy of a child is relevant for the purposes of inheritance because it governs her status as “child,” “heir,” or “issue,” which in turn determines whether she can stand as a testate or intestate beneficiary to her parents’ estates.⁶⁴ The preservation of this primitive distinction is extremely dangerous in a society that utilizes reproductive technologies as a possible means to conceive outside the context of the “traditional” family.⁶⁵ This issue is especially pertinent in cases of homosexual couples relying on

⁶¹ See Shapo, *supra* note 30, at 1097–98 (discussing generally the impact of reproductive technologies on the legal status of both parents and the legal status of parents on inheritance rights); see also Garrison, *supra* note 58, at 883 (explaining that the marital presumption of legitimacy is more rebuttable today due to blood and DNA tests, which can disprove paternity with a high degree of reliability).

⁶² CUSINE, *supra* note 57, at 59. In legal systems throughout the world, including in the United States, the United Kingdom, France, and Germany, the legal status of a child largely depends on the legal relationship (marital relationship) of his parents. *Id.* This type of regulation reflects the common law in which illegitimate (non-marital) children possessed fewer rights than a legitimate child born to married parents. *Id.* Much of the family law legal framework in the United States was based off of the British system and then altered to meet the interests and concerns of the states. See Susan E. Dalton, *From Presumed Fathers to Lesbian Mothers: Sex Discrimination and the Legal Construction of Parenthood*, 9 MICH. J. GENDER & L. 261, 268 (2003). British laws in the seventeenth century demonstrate that a child’s legitimacy status was originally inseparable from that of his parents. *Id.* Children born out of wedlock were considered illegitimate and their parents had no legal duty to support them. *Id.* at 268–69.

⁶³ Shapo, *supra* note 30, at 1102 (suggesting that an absence of legislation specifically addressing the legal status of a child born through the use of reproductive technology leaves their legal status to be determined according to common law); see CUSINE, *supra* note 57, at 59 (commenting that a child was legitimate under common law if it was born of a legally valid marriage, and such child enjoyed the fullest rights when measured against the rights of other children).

⁶⁴ See Heard, *supra* note 7, at 939–40 (noting that generally an illegitimate child cannot inherit from his father under a class gift in a will made to “children” or “heirs” because, in most cases, that class does not include illegitimate children); see also Kindregan & McBrien II, *supra* note 50, at 582 (explaining that while a court, when referring to a class of beneficiaries, may construe terms such as “my issue” or “my grandchildren” as requiring a genetic relationship between the testator and child claiming to be the beneficiary, other courts might construe such terms to include those children conceived through assisted reproduction).

⁶⁵ Kirby, *supra* note 1, at 4. This benefit extends to single women who wish to conceive without a partner, unmarried couples where the male is infertile, and homosexual sexual couples who cannot get married under state law. *Id.* State statutes vary in regards to whether a child born into a void or voidable marriage is considered legitimate. See CUSINE, *supra* note 57, at 34. In addition, courts have also interpreted statutes in favor of legitimizing children born into a common law marriage in a state where such a marriage was not recognized. *Id.* As a result of such a liberal policy, it appears unlikely that a court would find a child born as a result of AIH to be illegitimate. *Id.*

reproductive technologies to reproduce.⁶⁶ Section II *infra* contains a more in-depth discussion of “non-traditional” families relying on assisted reproduction.

The third category of inheritance law implications focuses on the treatment of reproductive material as “property.” The legal understanding of “property” typically extends not only to the physical object, but to the “bundle of rights recognized in that object.”⁶⁷ These rights include the ability to control, possess, use, exclude, profit from, and dispose of assets.⁶⁸ Courts and legislatures have been hesitant to assign this “bundle” to the area of reproductive control.⁶⁹ Though courts have not addressed the issue, the question of whether reproductive materials (including sperm, eggs, and embryos) can be inherited assumes that this material can be considered property.⁷⁰ The discussion below illustrates the ways that several advanced procedures raise this issue.

1. Artificial Insemination Implicating Inheritance Laws

In discussing how AI implicates inheritance law, it is necessary to distinguish between the three types of insemination methods—AIH (husband), AID (donor), and AIDH (husband and donor)⁷¹—because they

⁶⁶ See Shapo, *supra* note 30, at 1124–25 (reviewing cases involving homosexual couples that have conceived by reproductive technologies, challenging accepted notion of a “family unit”); see also Catherine DeLair, *Ethical, Moral, Economic and Legal Barriers to Assisted Reproduction Technologies Employed by Gay Men and Lesbian Women*, 4 DEPAUL J. HEALTH CARE L. 147, 147–49 (2000) (discussing how an increasing number of gay men and lesbian women who seek to bear and raise biologically related children have been facilitated by a host of assisted reproductive technologies).

⁶⁷ Barry Brown, *Reconciling Property Law with Advances in Reproductive Science*, 6 STAN. L. & POL'Y REV. 73, 74 (1995) (noting the legal definition of property); see Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 545 (2005) (explaining the concept of a “bundle of rights”).

⁶⁸ See KINDREGAN & MCBRIEN I, *supra* note 8, at 65 (for a general discussion of reproductive material as property); see also Bell & Parchomovsky, *supra* note 67, at 546 (listing the rights of ownership in property).

⁶⁹ Brown, *supra* note 67, at 73–74 (discussing the reasons why courts are reluctant to apply property rights analysis to the area of reproductive control); see Sandra B. Zellmer & Jessica Harder, *Unbundling Property in Water*, 59 ALA. L. REV. 679, 724, 726–27 (noting that reproductive material is recognized by most state legislatures as having characteristics of “quasi-property rights”).

⁷⁰ See Andrea Corvalan, *Fatherhood After Death: A Legal and Ethical Analysis of Posthumous Reproduction*, 7 ALB. L.J. SCI. & TECH. 335, 338–39 (1997) (emphasizing that courts struggle with classifying sperm as property, but recognize it as an “interim” property interest); see also James E. Bailey, *An Analytical Framework for Resolving the Issues Raised by the Interaction Between Reproductive Technology and the Law of Inheritance*, 47 DEPAUL L. REV. 743, 748 (1998) (citing *Hecht v. Superior Court of Los Angeles County*, 20 Cal. Rptr. 2d 275 (Ct. App. 1993)) (stating that *Hecht* is the first and only case, thus far, to address the question of whether gametes can be bequeathed or inherited); see also *Hecht*, 20 Cal. Rptr. 2d at 283–84 (holding that the sperm in question was part of the decedent's estate and that it could be validly bequeathed to his wife).

⁷¹ See Heard, *supra* note 7, at 932 (discussing the difference between AIH and AID); see also LIU, *supra* note 25, at 12 (describing the technique of AIDH, which she refers to as CAI); Steven M. Recht, “M” is for Money: *Baby M and the Surrogate Motherhood Controversy*, 37 AM. U. L. REV. 1013, 1050

each carry different legal implications.⁷² The method carrying the fewest legal implications is AIH. Because this variety of AI employs the husband's sperm, the traditional "procreational unit" of man and wife is preserved and the presumption of paternity is maintained.⁷³ Thus, this procedure is essentially an alternative to sexual intercourse and, if successful, it produces a child with two identifiable parents.⁷⁴

Conversely, AID and AIDH introduce a third-party male into the procreation process and can therefore raise questions of paternity.⁷⁵ Under many state statutes, including New York's, if a child is born to a married couple by AID or AIDH, the husband will only be presumed to be the father of the child if he consents to the procedure.⁷⁶ In either scenario, the husband's paternity will be presumed even though he was not necessarily the sperm donor.⁷⁷ However, if the child is born to a non-married couple by AID, or if the husband does not consent to the AIDH procedure, the male partner's or husband's paternity will be subject to considerations of biological parenthood.⁷⁸ Additionally, the donor's paternity will not be cut off and, if he demonstrates commitment to the child, his paternal rights cannot be terminated without his consent.⁷⁹ As discussed above, the

n.31 (1988) (describing the three methods of artificial insemination: AIH, AID, and CAI).

⁷² See McAllister, *supra* note 7, at 59–60 (comparing the different reproductive technologies and their respective legal implications); see also LIU, *supra* note 25, at 8–12 (explaining the three types of AI and acknowledging the legal implications arising out of each).

⁷³ See McAllister, *supra* note 7, at 59. The traditional notion of "two-parent procreation" is maintained by the method of AIH. *Id.* AIH produces a biological offspring from a married couple, which poses few legal problems. Koehler, *supra* note 28, at 338 n.3.

⁷⁴ McAllister, *supra* note 7, at 59 (noting that AIH procedure creates the same result as if the child was conceived by traditional means of conception); see Recht, *supra* note 71, at 1050 n.31 (illustrating how AIH facilitates the induction of the father's sperm with the mother's egg).

⁷⁵ McAllister, *supra* note 7, at 59. The sperm donor in an AID procedure is unknown. *Id.* Neither the sperm donor nor the couple knows each other in an AIDH procedure. LIU, *supra* note 25, at 11–12. Determinations of paternity become difficult in both AID and AIDH procedures. Koehler, *supra* note 28, at 338 n.3.

⁷⁶ N.Y. DOM. REL. LAW § 73 (McKinney 2008).

⁷⁷ Shapo, *supra* note 30, at 1097. The common law traditionally presumed the paternity of the husband where a child was born to a married couple. *Id.* With the introduction of AID, in nearly every state, the presumption is rebuttable by production of evidence that the husband is sterile or impotent. *Id.* However, the courts will not overturn the presumption where "a finding of non-paternity would be contrary to the child's best interests." *Id.* The New York Family Court reiterated that a strong legal presumption exists that any child born to a married woman is presumptively the legitimate issue of her marriage, and that the husband is the presumed legal father of such issue. *Elena A. v. Judith N.*, 591 N.Y.S.2d 946, 948 (Fam. Ct. 1992). However, this presumption is rebuttable. *Id.*

⁷⁸ Shapo, *supra* note 30, at 1097–98 (noting that paternity of a child born to an unmarried woman has been determined by different rules under which biological parenthood of the father, once established, may be considered more important); *Lehr v. Robertson*, 463 U.S. 248, 261–62 (1983) (stating that the significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring).

⁷⁹ Shapo, *supra* note 30, at 1097–98 (emphasizing that the Supreme Court has held that an unwed biological father has no due process rights to a hearing before his child is adopted unless he has established a relationship with the child or with the family unit of the mother and child and has

question of paternity is relevant because it is essential in determining from whom the child can inherit in several contexts.⁸⁰

Because AID and AIDH both raise issues of paternity, the legitimacy of a child conceived by either procedure may also be questioned. Under common law, an illegitimate child was not entitled to inherit from her father or mother because she was considered a "child of no one."⁸¹ Most states have moved away from the unforgiving common law and have thus adapted their inheritance laws to treat this child as an intestate heir of her mother, but not of her father.⁸² Despite the adaptation, however, the legitimacy of a child under most state statutes still depends on the marital status of her parents.⁸³ Unfortunately, this antiquated means of determining legitimacy has also carried into states' AI statutes, which apply only to children born by means of AI to married couples.⁸⁴ In addition to adopting its own AI statute, specifically addressing the legitimacy of children born through AI, New York has also addressed the matter in case law.⁸⁵ While these steps contribute to the protection of children conceived by AI, they do not apply to children conceived through other reproductive technologies. Thus, the legal status of children conceived through most reproductive

demonstrated commitment to this relationship); see *Thomas v. Robin*, 618 N.Y.S.2d 356 (App. Div. 1994) (indicating that the paternal rights of a sperm donor were not cut off because of the relationship he had forged with the child).

⁸⁰ See *supra* notes 54–58 and accompanying text (comparing the UPA and the Uniform Probate Code in their treatment of AI).

⁸¹ See *Shapo*, *supra* note 30, at 1098 (noting the law regarding inheritance by nonmarital children has changed significantly from the traditional common law); see also *JESSE DUKEMINIER ET AL., WILLS, TRUSTS & ESTATES* (7th ed. 2005) (stating that although innocent of any sin or crime, children of unmarried parents were given harsh, pitiless treatment by the common law).

⁸² See *Shapo*, *supra* note 30, at 1098–99 (illustrating that a child can be an heir of his or her father if his or her parents are married and the father acknowledges paternity); see also *Trimble v. Gordon*, 430 U.S. 762, 776 (1977) (finding that the primary purpose of an Illinois statute is "to provide a system of intestate succession more just to illegitimate children than the prior law, a purpose tempered by a secondary interest in protecting against spurious claims of paternity").

⁸³ See *supra* notes 59–61 and accompanying text (indicating that new technologies have altered presumptions concerning inheritance).

⁸⁴ N.Y. DOM. REL. LAW § 73 (McKinney 2008) (highlighting that, in New York, the statute only applies to children born by AI to a married woman with her husband's consent, whereas the legitimacy of a non-marital child born by AI has not been statutorily addressed); see *Gotlib v. Ratsutsky*, 601 N.Y.S.2d 1 (App. Div. 1993) (noting that where child support is sought for a child who is the product of artificial insemination and the provisions of Section 73 are raised as a defense, the court, in ruling on temporary child support, must make a preliminary determination as to whether there is enough merit to the claim of paternity to warrant the imposition of child support obligations during the pendency of the action).

⁸⁵ See N.Y. DOM. REL. LAW § 73 (stating that "[a]ny child born to a married woman by means of artificial insemination . . . shall be deemed the legitimate, natural child of the husband and his wife"); see also *Howard-Potter*, *supra* note 53, at 63 (recognizing § 73 of New York Domestic Relations Law (DRL), as a statute determining the legitimacy of children born through AI, applies only to married couples); see also *Shapo*, *supra* note 30, at 1112–25 (discussing the ways in which AI implicates inheritance law and the ways states have responded).

technologies still hangs in the balance.

2. Surrogacy and Embryo Transfer Implicating Inheritance Laws

Like AI, surrogacy and embryo transfer implicate inheritance law by establishing ambiguous legal parentage.⁸⁶ However, unlike AI, surrogacy and embryo transfer challenge the traditional presumption of maternity rather than paternity.⁸⁷ Traditional surrogacy, in which the surrogate is genetically related to the child and carries the child to term,⁸⁸ creates more of a challenge to the presumption of maternity than does gestational surrogacy.⁸⁹ In traditional surrogacy, the surrogacy agreement entered into can be difficult to enforce if the birth mother, who is also the child's biological mother, decides not to surrender her parental rights.⁹⁰ When this occurs, a custody battle generally ensues between the intended mother and the biological surrogate mother. In gestational surrogacy, on the other hand, neither woman is genetically related to the child but the surrogate has the ability to claim parental rights on the grounds that she is the "gestational" mother of the child.⁹¹

Embryo transfer resembles traditional surrogacy in that the egg is fertilized by AI inside the donor's body.⁹² Thus, the egg donor is still genetically related to the child, as she is in the traditional surrogacy procedure. However, embryo transfer requires the fertilized egg to be removed and implanted in the womb of the "intended" mother,⁹³ so the egg donor does not serve as the "gestational" mother.⁹⁴ It has been suggested that the availability of alternative procedures, including embryo transfer, may explain the limited use of surrogacy.⁹⁵

⁸⁶ See *supra* notes 71–85 and accompanying text (illustrating how AI implicates inheritance law).

⁸⁷ See KINDREGAN & MCBRIEN I, *supra* note 8, at 132 (providing a general discussion of surrogacy); see also McAllister, *supra* note 7, at 88–91 (discussing whether the "gestational mother, the genetic mother, or both are to be recognized as parents").

⁸⁸ See *supra* notes 33–34 and accompanying text (commenting on traditional surrogacy).

⁸⁹ See *supra* note 35 and accompanying text (discussing gestational surrogacy).

⁹⁰ See KINDREGAN & MCBRIEN I, *supra* note 8, at 132 (discussing the reasons for the decrease in use of traditional surrogacy); see also Shapo, *supra* note 30, at 1101–05 (explaining the ways reproductive technologies have impacted the "traditional family").

⁹¹ See KINDREGAN & MCBRIEN I, *supra* note 8, at 132–33 (providing a general discussion of surrogacy); see also McAllister, *supra* note 7, at 88–91 (noting the difference between "gestational" and "genetic" motherhood and the parental ties that are associated with each; the gestational mother is the woman who carries the child to term and actually gives birth to the child; the genetic mother is the woman whose egg was fertilized to create the child).

⁹² See *supra* notes 32–35 and accompanying text (discussing surrogacy).

⁹³ See *supra* note 36 and accompanying text (describing embryo transfer).

⁹⁴ *Id.*

⁹⁵ See KINDREGAN & MCBRIEN I, *supra* note 8, at 132 (stating that increased use of IVF and embryo transfer have made gestational surrogacy more practical); see also Shapo, *supra* note 30, at

Procedures like surrogacy and embryo transfer have made the determination of the maternal rights of a woman as crucial to inheritance laws as determining paternal rights of a man.⁹⁶ Thus, these two procedures implicate inheritance by severely complicating the determination of the legal status of the child's mother in allowing a gestational mother to be genetically unrelated to the child to whom she gives birth.⁹⁷ Next to AI, surrogacy is the only other reproductive technology that has been specifically addressed by the New York Legislature. Perhaps the most prominent effect of New York's surrogacy legislation is the prohibition of surrogacy contracts under Section 122 of the Domestic Relations Law (DRL), which states that surrogacy contracts are "contrary to the public policy" of New York State and are thus unenforceable.⁹⁸ Despite this prohibition, it remains necessary to consider the ways surrogacy implicates inheritance law because the procedure is generally lawful when it is not part of a compensation agreement. Part II and III *infra* will further examine the unique legal problems raised by these techniques, and how they have or have not been addressed under New York law.

3. IVF Implicating Inheritance Laws

Like all of the above reproductive technologies, IVF implicates inheritance law by allowing a departure from traditional parental relationships.⁹⁹ However, IVF not only divorces sex from reproduction (as other technologies do), but it also divorces conception from birth and genetic contribution from gestation.¹⁰⁰ Thus, the nature of the procedure¹⁰¹ creates a potential for numerous genetic and gestational combinations:¹⁰²

1106 (providing a general discussion of AI).

⁹⁶ See *supra* notes 54–61 and accompanying text (emphasizing the significance of determining a child's legal parents when using reproductive technology because parentage establishes inheritance rights); see also Christine A. Djalleta, *A Twinkle in a Decedent's Eye: Proposed Amendments to the Uniform Probate Code in Light of New Reproductive Technology*, 67 TEMP. L. REV. 335, 344–45 (1994) (discussing the difficulties in determining parentage using new reproductive technologies and the importance of this determination on inheritance).

⁹⁷ See LIU, *supra* note 25, at 15–16 (showing the number of biological links that a child, born through surrogacy, may have); see also Nicole L. Cucci, *Constitutional Implications of In Vitro Fertilization Procedures*, 72 ST. JOHN'S L. REV. 417, 444 (1998) (noting that a child conceived through reproductive technology could have as many as five parents).

⁹⁸ N.Y. DOM. REL. LAW § 122 (McKinney 2008).

⁹⁹ See McAllister, *supra* note 7, at 62 (stating that either the donor or the recipient may be the intended mother in IVF); see also Shapo, *supra* note 30, at 1194–95 (hypothesizing that all parties involved could be recognized as legal parents in an IVF situation).

¹⁰⁰ Shapo, *supra* note 30, at 1131 (stating that IVF, like other reproductive technologies, allows for pregnancy to occur without using traditional means); McAllister, *supra* note 7, at 60–61 (describing how a successful pregnancy is achieved through IVF absent traditional methods).

¹⁰¹ See *supra* notes 38–44 and accompanying text (describing the process involved in IVF).

¹⁰² Shapo, *supra* note 30, at 1130 (stating IVF can occur using a combination of contributors);

(1) the egg and sperm may come from the “intended”¹⁰³ parents; (2) either the egg or the sperm, alone, may be donated; (3) all reproductive material may be donated by persons other than the “intended” parents, and then the fertilized embryo can be implanted in either (a) the “intended” mother’s womb, or (b) the womb of a surrogate.¹⁰⁴ Clearly, IVF can introduce numerous legal complications where donated reproductive material is used along with a gestational surrogate.¹⁰⁵ Given the sheer number of parties that may be involved, IVF is probably the procedure that most seriously challenges the traditional notions of both “mother” and “father.”¹⁰⁶

The other significant legal implication arising out of IVF concerns the question of whether a property interest can exist in reproductive material.¹⁰⁷ Because the IVF procedure unites reproductive material outside the body, it raises the question of “who ‘owns’ fertilized embryos.”¹⁰⁸ This question generally arises in the context of disposing of extracorporeal embryos that are created through IVF.¹⁰⁹ The unique *Hecht* case is the only case to date recognizing gametes as property that may be bequeathed.¹¹⁰ However, statutory law has not yet recognized any

Cucci, *supra* note 97, at 444 (listing the five possible people that can be involved in the IVF process).

¹⁰³ See *supra* note 33 and accompanying text (defining the “intended mother” as the sperm donor’s wife or partner).

¹⁰⁴ See FREEDMAN, *supra* note 32, at 43 (discussing how reproductive technologies—including IVF—have changed the traditional parental relationship, stating “[i]t is already possible for a child to have five different ‘parents’: (1) the woman who donated the egg; (2) the man who donated the sperm; (3) the woman to whose uterus the fertilized embryo is transferred so that she can carry it to birth; (4) and (5) the man and woman who will receive and presumably raise the child”); see also McAllister, *supra* note 7, at 62 (listing examples of combinations of genetic donors in IVF).

¹⁰⁵ Shapo, *supra* note 30, at 1131 (stating that IVF becomes more legally complicated when genetic material is used from multiple sources); McAllister, *supra* note 7, at 62 (noting that the legal relationship can become complicated because, in addition to using a gestational mother, the sperm can come from any source, including a third party).

¹⁰⁶ See Shapo, *supra* note 30, at 1130–31 (explaining the various combinations arising from IVF and the implications of each); see also Cucci, *supra* note 98, at 444 (describing the number of parental relationships that can occur from IVF).

¹⁰⁷ See *supra* notes 65–66 and accompanying text (discussing inheritance issues among non-traditional families); see also Charles M. Jordan, Jr. & Casey J. Price, *First Moore, Then Hecht: Isn’t it Time We Recognize a Property Interest in Tissues, Cells, and Gametes?*, 37 REAL PROP. PROB. & TR. J. 151, 153 (2002) (noting the legal definition of property—material to which the law has extended the entire “bundle” of property rights).

¹⁰⁸ MARCIA MOBILIA BOUMIL, LAW, ETHICS AND REPRODUCTIVE CHOICE 10 (1994) (emphasis added) (introducing this question in the context of explaining that “[t]he wife sought ‘custody’ on the basis that she was unable to have any children except through IVF”); see Jordan & Price, *supra* note 107, at 153 (addressing the legal question raised through reproductive technologies—whether a person has a legal claim to his or her reproductive tissues and cells once it has been separated from his or her body).

¹⁰⁹ See Shapo, *supra* note 30, at 1142 (discussing the issue that surrounds the disposal of fertilized embryos); see also Jessica Berg, *Owning Persons: The Application of Property Theory To Embryos and Fetuses*, 40 WAKE FOREST L. REV. 159, 165–66 (2005) (outlining the issues of discarding and freezing embryos).

¹¹⁰ *Hecht v. Superior Court of Los Angeles County*, 20 Cal. Rptr. 2d 275 (Ct. App. 1993). For a

reproductive material as personal property.¹¹¹ This issue frequently arises in the context of reproductive technologies where cryopreservation is united with IVF, creating the potential for fertilized embryos and gametes to outlive one or both of their genetic donors.¹¹²

4. Cryopreservation Implicating Inheritance

Cryopreservation, as a newer reproductive technology, raises two general issues with respect to inheritance: (1) whether frozen gametes or embryos, to which a decedent has genetically contributed, can be considered part of the decedent's estate at the time of his death; and (2) whether children born from frozen reproductive material, and conceived after the genetic parent's death, have a right to inherit from the deceased parent's estate.¹¹³ Within the scope of these two general issues, inheritance law is implicated in a number of different ways.¹¹⁴ Also, because the technique is commonly used in conjunction with other techniques like IVF,¹¹⁵ cryopreservation raises the legal implications associated with those procedures as well.¹¹⁶

The question within the first of these two issues is whether embryos created by IVF that are cryogenically frozen¹¹⁷ can be bequeathed as part

discussion of *Hecht* as the first case involving reproductive technology, see *supra* note 70.

¹¹¹ See Jordan & Price, *supra* note 107, at 153 (expressing whether a person makes a legal claim to his tissue and cells); see also Jennifer Long Collins, *Hecht v. Superior Court: Recognizing A Property Right In Reproductive Material*, 33 U. LOUISVILLE J. FAM. L. 661, 663 (1995) (summarizing the case history leading up to *Hecht*).

¹¹² Jordan & Price, *supra* note 107, at 153. In the article, *First Moore, Then Hecht: Isn't It Time We Recognize a Property Interest in Tissues, Cells and Gametes?*, the authors recognize that "if the gamete is not considered an interest in property, the donor's interest in the gamete expires at death and thus makes any passage to and use of the gametes by a surviving third party impossible." *Id.* Given the short viability of reproductive material outside the body, only cryogenically preserved reproductive material could really ever be bequeathed. *Id.* See also Collins, *supra* note 111, at 674.

¹¹³ See Shapo, *supra* note 30, at 1142 (reviewing the inheritance issues created by new reproductive technology); see also Joshua Greenfield, *Dad was Born a Thousand Years Ago? An Examination of Post-Mortem Conception and Inheritance, with a Focus on the Rule Against Perpetuities*, 8 MINN. J. L. SCI. & TECH. 277, 278-79 (presenting issues that deal with inheritance and cyropreservation).

¹¹⁴ See Shapo, *supra* note 30, at 1148-58 (outlining different ways in which inheritance law is linked to reproductive technology); see also Greenfield, *supra* note 113, at 277-89 (depicting the inheritance law issues linked to cyropreservation).

¹¹⁵ IVF and cryopreservation are often used in conjunction because of the ways in which they supplement each other. See *supra* notes 50-52 and accompanying text.

¹¹⁶ For example, if an embryo created by IVF is cryogenically frozen, the problems of parental ambiguity and child legitimacy that accompany IVF will follow that embryo. See McAllister, *supra* note 7, at 63. The problems are also seen when dealing with inheritance laws. Shapo, *supra* note 30, at 1149-53.

¹¹⁷ See Jordan & Price, *supra* note 107, at 152-53. This is the terminology used to refer to the method employed in cryopreservation. *Id.* A cryopreservation contract was signed by a husband and wife when they cryogenically preserved embryos they had created using their gametes. See Angela K. Upchurch, *The Deep Freeze: A Critical Examination of the Resolution of Frozen Embryo Disputes*

of the donor's estate.¹¹⁸ This inquiry is relevant for the purposes of inheritance because frozen reproductive material can possibly survive its biological progenitors.¹¹⁹ If an embryo is left and its progenitors do not direct its disposition after their death, the executor of the estate will be left to decide the embryo's disposition.¹²⁰ Because an embryo is the product of the combination of reproductive material from two donors, undirected disposition of an embryo would require an executor to sever the donors' individual interests.¹²¹ Thus, because gametes are the reproductive material of only one human, it may be slightly easier for an executor to determine their disposition without direction.¹²² However, inherited gametes can be involved in posthumous conception;¹²³ thus, it is necessary to determine whether gametes can be inheritable material as well.

The second general inheritance implication raised by cryopreservation is rooted in the inheritance rights of "posthumously conceived"¹²⁴ children.

Through the Adversarial Process, 33 FLA. ST. U. L. REV. 395, 396 (2005).

¹¹⁸ See Jordan & Price, *supra* note 107, at 153 (acknowledging the need for the law to come to a conclusion about how to treat frozen gametes upon the producer's death); see also Shapo, *supra* note 30, at 1148–51 (discussing the possibility of embryos as inheritable property).

¹¹⁹ See KINDREGAN & MCBRIEN I, *supra* note 8, at 87 (asserting that the ability of a frozen embryo to survive its progenitors provokes questions relating to postmortem reproduction and the effects it may have on inheritance); see also McAllister, *supra* note 7, at 63 (noting the potential of long-term survival of cryogenically preserved embryos and the subsequent possibility of a child being born well after the death of its genetic parents).

¹²⁰ See Berg, *supra* note 109, at 163 (stating that in situations in which general property law concepts will be applied to embryos, they should be treated just as any other piece of personal property); see also Shapo, *supra* note 30, at 1151–52 (comparing the consequences of not specifically directing the postmortem disposition of embryos with the consequences of not specifically directing the postmortem disposition of gametes).

¹²¹ See Shapo, *supra* note 30, at 1151 (observing the difficulty that would result if one donor died and did not bequeath his interest in the embryo to the other donor); see also Upchurch, *supra* note 117, at 407–08 (pointing to disagreements about whether the rights of individual donors to an embryo should be considered jointly or in their capacity as individuals).

¹²² See Michael K. Elliott, *Tales of Parenthood From the Crypt: The Predicament of the Posthumously Conceived Child*, 39 REAL PROP. PROB. & TR. J. 47, 50 (2004). Legislatures must decide how to treat the inheritance rights of posthumous children because of the ability to store gametes and embryos for extended periods of time. *Id.* The question of ownership as applied to gametes is not nearly as complicated as it is applied to embryos, because gametes are derived from a single progenitor, whereas an embryo is the production of two gamete donors. See Shapo, *supra* note 30, at 1147–51. Additionally, several states are more concerned with the protection of embryos because they possess the potential to develop into a person, whereas gametes are incapable of such development. *Id.* at 1147–51. However, the question of whether gametes alone may be bequeathed is relevant to posthumous conception and, therefore, must be determined. *Id.* at 1153. The procreative rights model is an approach used to determine how the rights in and to embryos shall be divided by weighing the interests of each donor and finding who has the greater constitutionally protected interest. See Upchurch, *supra* note 117, at 411.

¹²³ See Elliott, *supra* note 122, at 48 (declaring that both men and women can freeze gametes, which can be used to produce a child even after the gamete donor has died); see also Shapo, *supra* note 30, at 1148 (referring to the *Hecht* case where the decedent testator bequeathed several vials of his frozen sperm to his companion, Deborah Hecht; further providing that if she desired, he wished for her to use the frozen sperm to conceive a child after his death).

¹²⁴ KINDREGAN & MCBRIEN I, *supra* note 8, at 219–20. "Posthumously conceived" is a term used

The question of whether a posthumously conceived child is legitimate is inherent to this larger inquiry because her legitimacy will be considered in determining her inheritance rights.¹²⁵ This issue applies to inheritance rights of posthumously conceived children under both intestate and testate dispositions of property.¹²⁶ Under New York's intestacy statute, the general rule is that a distributee must survive the testator (i.e., must be living at the time of the testator's death) in order to inherit.¹²⁷ The statute specifically includes children in gestation at the time of testator's death but subsequently born alive, otherwise known as children "a ventre sa mer," as persons alive at the time of testator's death.¹²⁸ However, due to the specificity of this requirement, a posthumously conceived child would not be entitled to an intestate share because she would not qualify as "issue," or as an "adopted child."¹²⁹

Within the realm of testamentary disposition, the ability of a posthumously conceived child to inherit is relevant on several levels.¹³⁰ First, a posthumously conceived child may be excluded from a class of beneficiaries—named in the testamentary instrument of her deceased genetic parent—such as a class of "heirs," "children," or "issue."¹³¹ Though several states have expressly recognized posthumously conceived children as legitimate, the majority of states have not yet addressed the issue.¹³² Therefore, in order to assure that posthumously conceived

to describe children born of frozen reproductive material after the death of one or both of its genetic parents, which is sometimes replaced with "postmortem;" however, the former will be used throughout this Note. *Id.* See Kristine S. Knaplund, *Equal Protection, Postmortem, Conception, and Intestacy*, 53 U. KAN. L. REV. 627 (2005); see also Margaret Ward Scott, Comment, *A Look at the Rights and Entitlements of Posthumously Conceived Children: No Surefire Way to Tame the Reproductive Wild West*, 52 EMORY L.J. 963 (2003).

¹²⁵ See Heard, *supra* note 7, at 939–40 (noting that illegitimate children are often not considered a part of the class when a will names "children," "heirs," or "issue"); see also Knaplund, *supra* note 124, at 631–32 (pointing out that a postmortem child faces difficulties when attempting to establish a right to inheritance from a biological parent who was deceased when he was conceived).

¹²⁶ See Shapo, *supra* note 30, at 1155–58 (discussing the possibilities of both a testate decedent and an intestate decedent with a posthumously conceived child succeeding him); see also Scott, *supra* note 124, at 972–74 (observing the problems that arise when a posthumously conceived child seeks to inherit from the deceased parent when there is a will and when there is not a will).

¹²⁷ See N.Y. EST. POWERS & TRUSTS LAW § 4-1.1 (McKinney 2008).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ See Heard, *supra* note 7, at 939–51 (outlining the ways in which cryopreservation implicates testate disposition); see also Brianne M. Star, *A Matter of Life and Death: Posthumous Conception*, 64 LA. L. REV. 613, 615–19 (2004) (highlighting the relevance surrounding such an inheritance in a testamentary disposition).

¹³¹ Heard, *supra* note 7, at 939–40. Under the laws of probate an illegitimate child is excluded from a class of "heirs," "issue," or "children." *Id.* "Historically, an illegitimate child could not take in intestacy from a deceased parent and was not included in a testamentary gift . . ." Stacey Sutton, *The Real Sexual Revolution: Posthumously Conceived Children*, 73 ST. JOHN'S L. REV. 857, 915 (1999).

¹³² See KINDREGAN & MCBRIEN I, *supra* note 50, at 588. The states that have expressly defined

children will not be excluded from class gifts directed towards any of the above groups, attorneys must draft wills with greater specificity.¹³³

Second, the right of a posthumously conceived child to inherit from her deceased progenitor(s) may complicate the application of a state's anti-lapse statute.¹³⁴ New York's anti-lapse statute, Estates, Powers and Trusts Law (EPTL) Section 3-3.3, applies where a child named as a beneficiary predeceases the testator.¹³⁵ Under the statute, gifts to certain predeceased beneficiaries pass to the issue of that beneficiary.¹³⁶ For example, a gift to the testator's child who predeceased the testator will pass to the children of the predeceased child, who are also the grandchildren of the testator. Thus, the normal application of this statute would be challenged if a posthumously conceived child were born to the predeceased beneficiary, years after the testator had died.¹³⁷

Third, the right of a posthumously conceived child to inherit from her deceased genetic parent may cause certain bequests to violate the common law rule against perpetuities.¹³⁸ The rule against perpetuities states "no interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."¹³⁹ A class gift is considered vested only when the "interest of every member is fixed and ascertained;"¹⁴⁰ the mere possibility that another member may qualify for the class at a later date may prevent the gift from vesting.¹⁴¹ Thus, the

the inheritance rights of posthumously conceived children by statute include California, Colorado, Delaware, Florida, North Dakota, Texas, Virginia, Washington, and Wyoming. *Id.* Several other states have adopted or are considering the most recent version of the UPA (revised in 2002), which specifically addresses posthumous parentage in the context of assisted reproduction. *Id.* The majority of states continue to deny posthumously conceived children legal status and inheritance rights. *See* Star, *supra* note 130, at 613.

¹³³ *See* Heard, *supra* note 7, at 939–41 (noting the importance of unambiguously stipulating the testator's expressed intent); *see also* Star, *supra* note 130, at 617 (stating that courts will generally not interfere with a testator's clear intent when enforcing a testamentary disposition).

¹³⁴ *See* Heard, *supra* note 7, at 951 (emphasizing that the "[a]pplication of the anti-lapse statute could prove difficult if long after the estate has been settled, a freeze-thaw child of the deceased beneficiary is born"); *see also* Susan N. Gary, *Posthumously Conceived Heirs*, 19 APR. PROB. & PROP. 32, 38 (2005) (suggesting that lawyers should be cognizant of the potential dilemma presented by the anti-lapse statute under such situations).

¹³⁵ N.Y. EST. POWERS & TRUSTS LAW § 3-3.3 (McKinney 2008).

¹³⁶ *Id.*

¹³⁷ *See id.* (lacking a provision addressing this situation).

¹³⁸ *See* Heard, *supra* note 7, at 941–44 (positing the potential problems posthumous children present under the rule against perpetuities); *see also* Shapo, *supra* note 30, at 1156 (stating the inclusion of postmortem children in class gifts could violate the rule against perpetuities).

¹³⁹ Heard, *supra* note 7, at 941 (quoting GRAY, RULE AGAINST PERPETUITIES § 201 (3d ed. 1915)).

¹⁴⁰ *Id.* at 942.

¹⁴¹ Heard, *supra* note 7, at 942 (arguing the possibility of children born years after death could prevent vesting past the twenty-one year perpetuities period); *see* Shapo, *supra* note 30, at 1156 (opining that the estate could remain open to allow postmortem children's interests to vest).

inclusion of a posthumously conceived child as a member of the class can delay vesting beyond the time the rule allows, causing the gift to violate the rule and to become void.¹⁴² However, where the “rule of convenience”¹⁴³ applies to allow the class to artificially close when there are no intervening interests and where at least one person qualifies as a member of the class, this problem can be avoided. Unfortunately, the rule of convenience can only apply to close a class once the gift can be distributed (i.e., when at least one member of the named class already exists).¹⁴⁴

Fourth, and finally, the inheritance rights of a posthumously conceived child can disrupt the application of a state’s “after-born” statute, which establishes the inheritance rights of children born after the decedent executes his will.¹⁴⁵ However, this issue does not arise for posthumously conceived children of decedents whose wills are executed according to New York inheritance law.¹⁴⁶ Both of New York’s inheritance statutes addressing after-born children exclude posthumously conceived children through their precise language. Under N.Y. EPTL Section 2-1.3, posthumously conceived children are expressly excluded from the class of “children conceived before, but born alive after such disposition becomes effective,” referring to the disposition of decedent’s estate.¹⁴⁷ Additionally, through a 2007 amendment, the definition of “after-born” child under N.Y. EPTL Section 5-3.2 was adjusted to include only “child[ren] of the testator born during the testator’s lifetime or in gestation at the time of testator’s death and born thereafter.”¹⁴⁸

¹⁴² Heard, *supra* note 7, at 942 (noting new reproductive technologies can create potential violations of the rule against perpetuities); see Shapo, *supra* note 30, at 1156 (including postmortem children creates problems with the rule against perpetuities).

¹⁴³ LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS TRUSTS AND FUTURE INTERESTS 18–42 (4th ed. 2006) (stating that “a class gift that has not yet closed physiologically closes to future entrants on the distribution date if a beneficiary of the class gift is then entitled to distribution”).

¹⁴⁴ WAGGONER ET AL., *supra* note 143, at 18–42 (commenting that once the class closes due to convenience, no subsequently adopted or conceived persons can enter the class); see Jesse Dukeminier, *A Modern Guide to Perpetuities*, 74 CAL. L. REV. 1867, 1892 (1986) (discussing the two ways in which a class can close).

¹⁴⁵ WAGGONER ET AL., *supra* note 143, at 18–41 (explaining that new reproductive technologies have destroyed the notion that children cannot be conceived after a parent’s death); see Cindy L. Steeb, *A Child Conceived After His Father’s Death?: Posthumous Reproduction and Inheritance Rights. An Analysis of Ohio Statutes*, 48 CLEV. ST. L. REV. 137, 159 (2000) (stating that posthumous children complicate statutory schemes).

¹⁴⁶ See N.Y. EST. POWERS & TRUSTS LAW § 2-1.3 (McKinney 2008) (omitting a provision concerning after-born children).

¹⁴⁷ *Id.*

¹⁴⁸ N.Y. EST. POWERS & TRUSTS LAW § 5-3.2 (McKinney 2008).

II. A TANGO WITH TECHNOLOGY: NEW YORK'S RESPONSE TO INHERITANCE LAW IMPLICATIONS

This section examines the ways in which New York statutory and case law have or have not responded to the implications outlined above. Because several of the mentioned inheritance issues are raised by multiple technologies, and by the conjunction technologies (i.e., those techniques that employ more than one ART), this section is organized by issue rather than by technology. For example, many of the issues addressed below are raised in cases involving the use of artificial insemination; however, the same issues may arise in conjunction with other technologies and can likely be resolved in a similar manner.

A. *Determining Legal Parentage*

As illustrated above, the issue of legal parentage frequently arises with respect to technologies that introduce a third party, such as a donor or a surrogate, into the procreative process.¹⁴⁹ The question of parenthood where assisted reproduction is involved must be resolved to protect the child from the “potential legal handicaps” she might face.¹⁵⁰ Though legal parenthood is essential to determining a child's legitimacy and her subsequent inheritance rights,¹⁵¹ it is relevant to consider the legal determination of parenthood independently as a foundation. The two main sub-issues within the larger question of legal parentage pertain to: (i) defining who among the group of a child's gestational, biological, and social parents, are her legal parents; and (ii) adapting the traditional rules of parenthood to “non-traditional” parents.¹⁵²

¹⁴⁹ See *supra* Part I (illustrating that this issue frequently arises in cases of AID, IVF where a donor is involved, surrogacy, and embryo transfer).

¹⁵⁰ LIU, *supra* note 25, at 79 (emphasizing that, for example, “the deliberate creation of a child whose position is subject to legal and social discrepancies and is inferior to that of a child conceived naturally, may render the use of artificial reproductive techniques socially and morally unacceptable”); see Malina Coleman, *Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction*, 17 CARDOZO L. REV. 497, 529 (1996) (highlighting that “traditional approaches to defining parenthood are inadequate in the era of assisted human reproduction[.]” thus “[t]o protect the child produced by such procedures . . . there must be procedures in place which guarantee to the greatest extent possible that the decision to contribute one's reproductive function was freely made after careful deliberation”).

¹⁵¹ See *supra* note 66 and accompanying text (discussing the problems that homosexual couples face).

¹⁵² See Shapo, *supra* note 30, at 1101–05 (discussing the ways reproductive technologies have impacted the “traditional family”); see also John E. Durkin, *Reproductive Technology and the New Family: Recognizing the Other Mother*, 10 J. CONTEMP. HEALTH L. & POL'Y 327, 337 (1994) (indicating that “[a]dvances in reproductive technology . . . offer expanded opportunities for women

1. Determining Paternity: "Who's Your Daddy?"

Because of the numerous rights and obligations that are tied to fatherhood, its determination has been a legal issue since English common law reigned supreme.¹⁵³ Many of the traditions of paternity determination have remained;¹⁵⁴ however, reproductive technologies have called for exceptions to be made under modern law. For example, the antiquated presumption that the husband of a married woman is the legal father of a child born to her is still honored today.¹⁵⁵ However, where a child is conceived through AID or AIDH, a married man can rebut the presumption of his paternity.¹⁵⁶ Previously, the only evidence that could rebut the paternity presumption was that the man was away from his wife at the approximate time of conception, or that he was sterile or impotent.¹⁵⁷ Additionally, the development of reproductive technologies has made it more difficult for courts to rely upon biology as a means of determining legal paternity for children born to unmarried women.¹⁵⁸ The cases below are examples of ways the New York courts have determined paternity where reproductive technologies are involved.

who . . . want to have children outside the traditional rubric of the nuclear family").

¹⁵³ See Shapo, *supra* note 30, at 1097 (stating that the presumption that existed under the common law of England is still in existence); see also Stephen A. Sherman, *You Ain't My Baby Daddy: The Problem of Paternity Fraud and Paternity Laws*, 5 AVE MARIA L. REV. 273, 275 (2007) (noting that "the common law utilized the 'presumption of paternity' doctrine").

¹⁵⁴ Shapo, *supra* note 30, at 1097. As under English common law, paternity determination for a marital child differs from that of a non-marital child. *Id.* The purpose behind the common law was "to clarify whose duty it was to care" for children born into a lawful marriage. Sherman, *supra* note 153, at 275-76.

¹⁵⁵ Shapo, *supra* note 30, at 1097 (stressing that the presumption about paternity that arose in the common law of England still plays a role today). *But see* Sherman, *supra* note 153, at 274 (indicating that "modern courts have begun to abandon such an approach . . . [which] is a positive step . . . but moving too far will result in negative effects").

¹⁵⁶ Shapo, *supra* note 30, at 1097 (illustrating that the presumption can be rebutted by showing that "the husband is sterile or impotent or a blood test evidencing that the child could not be his"); Sherman, *supra* note 153, at 276 (highlighting that "[i]f the husband could prove impossibility, then the presumption could be successfully rebutted").

¹⁵⁷ See Howard-Potter, *supra* note 53, at 29 (outlining the problems with the common law presumptions of paternity in light of the advances in reproductive technology); see also Laurence J. McDuff, *The "Inconceivable" Case of Tierce v. Ellis*, 46 ALA. L. REV. 231, 233 (1994) (describing the old ways a paternity presumption may be rebutted).

¹⁵⁸ Howard-Potter, *supra* note 53, at 29. Determining paternity of a child born to an unmarried woman has been governed by rules that hold biological parenthood as an important factor. *Id.* Typically, there is no legal issue as to the genetic father's liability. McAllister, *supra* note 7, at 92. However, this method of determining fatherhood, known as the *genetic mode* has proven unsatisfactory in cases of reproductive assistance. LIU, *supra* note 25, at 74-75. Because many reproductive technologies allow a donor contributing his or her reproductive material for the creation of an embryo, the determination of parenthood on biological grounds is no longer fool proof. *Id.* Rather, the *genetic mode* of determination must incorporate a consideration of the biological parent(s)' intent to serve as a reliable method of determining fatherhood. *Id.* at 75-76.

a. New York Case Law Addressing the Question of Paternity Where Assisted Reproduction is Involved

In early cases, where paternity of a child conceived through AID was challenged, either support obligations were imposed on the husband or visitation was granted to him, but the child was not typically recognized as his legitimate offspring.¹⁵⁹ However, in 1958, in the case of *Abajian v. Dennett*,¹⁶⁰ the New York Supreme Court estopped a woman from denying the paternity of her former husband, which she attempted to do on the ground that the child was born to her through artificial insemination.¹⁶¹ The court ruled in favor of the former husband, who sought continuance of custody and visitation rights pursuant to a separation agreement he entered into with the respondent.¹⁶² The agreement was incorporated into a Nevada state divorce decree to which the court granted full faith and credit.¹⁶³

In 1994, New York courts addressed the same question of paternity raised in *Dennett* within a very different context; however, the outcome mirrored that of the 1958 case. In *Thomas v. Robin*,¹⁶⁴ the petitioner sperm donor sought an order of filiation and rights to visit his biological daughter, who was being raised by the respondent and her lesbian partner.¹⁶⁵ The parties orally agreed that the petitioner's contact with the child would be limited during the early years of her life; however, once the child reached the age of five, respondent consented to the petitioner having significantly more contact with his daughter.¹⁶⁶ Eventually, petitioner revealed to respondent his desire to establish a parental relationship with the child and respondent and her partner believed this violated the terms of their oral agreement.¹⁶⁷ The court disagreed, estopping the respondent from denying the petitioner parental rights to his daughter on the grounds that respondent initiated and encouraged the contact between petitioner and the child and upon evidence of the petitioner's commitment to the child.¹⁶⁸

¹⁵⁹ McAllister, *supra* note 7, at 71 (engaging in a historical analysis of cases dealing with the paternity of children born by AID, and reflecting upon the early response of the court to this question); *Gursky v. Gursky*, 242 N.Y.S.2d 406, 411–12 (Sup. Ct. 1963) (discussing the requirements of a father for support when he has induced the woman to go through with AID).

¹⁶⁰ 184 N.Y.S.2d 178 (Sup. Ct. 1958).

¹⁶¹ *Id.* at 180.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ 618 N.Y.S.2d 356 (App. Div. 1994).

¹⁶⁵ *Id.* at 358.

¹⁶⁶ *Id.* at 357–58. The parties agreed that petitioner would not call or send presents during the first three years of Ry's (the child's) life. *Id.*

¹⁶⁷ *Id.* at 358.

¹⁶⁸ *Id.* at 362 (holding that the relationship the petitioner established with the child was sufficient

b. New York Statutes Addressing the Question of Paternity Where Assisted Reproduction is Involved

Though the New York Legislature has not completely resolved the question of paternity in all situations where a reproductive technology is employed, it has addressed the issue in the case of surrogacy.¹⁶⁹ Section 111(b) of the DRL expressly allows for the determination of paternity by a surrogate.¹⁷⁰ However, it requires that the determination be made in accordance with the relevant provisions of the Family Court Act except that the surrogate has no power to grant any relief relating to the support of the child.¹⁷¹ Section 121 of the DRL, also applying to surrogacy contracts, defines the “genetic father” as the “man who provides sperm for the birth of a child born pursuant to a surrogate parenting contract.”¹⁷² These statutes resolve the issue of paternity in cases of surrogacy.

In addition to these sections of the DRL, other New York paternity statutes that are not specifically keyed to reproductive technology occasionally apply. For example, under N.Y. EPTL Section 4-1.2(a)(2),¹⁷³ if the father of a non-marital child can establish his paternity by one of the methods outlined in this provision, his child will be legitimate and will be able to inherit from him.¹⁷⁴ This statute is relevant to the inheritance rights of children conceived through reproductive technologies because some of them are also non-marital children.¹⁷⁵ In this manner, other New York

to justify his parental rights to the child).

¹⁶⁹ See N.Y. DOM. REL. LAW §§ 111(b), 122, 124 (McKinney 2008). These sections define the paternity rights of a “genetic father” with respect to a child born pursuant to a surrogate parenting contract, although such contracts are void and unenforceable in New York. *Id.*

¹⁷⁰ N.Y. DOM. REL. LAW § 111(b)(1) (specifying that a surrogate has jurisdiction to determine issue of paternity in adoption proceedings).

¹⁷¹ N.Y. DOM. REL. LAW § 111(b)(2); see N.Y. FAM. CT. ACT §§ 516(a), 571(a) (McKinney 2008) (indicating that New York allows for the determination of paternity through a written acknowledgement of paternity that is legitimized by the court).

¹⁷² N.Y. DOM. REL. LAW § 121(2) (McKinney 2008).

¹⁷³ N.Y. EST. POWERS & TRUSTS LAW § 4-1.2(a)(2) (McKinney 2008) (delineating the right of a non-marital child under inheritance laws of New York, providing that paternity has been acknowledged by the father).

¹⁷⁴ N.Y. EST. POWERS & TRUSTS LAW § 4-1.2. Under the statute, a non-marital child is the legitimate child of his father so that he and his issue can inherit from his father and his paternal kindred if: (A) A court of competent jurisdiction has issued an order of filiation declaring paternity, or (B) the father has signed an appropriately executed instrument acknowledging paternity, or (C) paternity has been established by clear and convincing evidence and the father openly and notoriously acknowledged the child as his own, or (D) a blood genetic marker test had been administered to the father which together with other evidence establishes paternity by clear and convincing evidence. *Id.*

¹⁷⁵ See Howard-Potter, *supra* note 53, at 55–56 (considering the inheritance rights of posthumously conceived children as non-marital children, under this statute); see also Ilene Sherwyn Cooper, *Posthumous Paternity Testing: A Proposal to Amend EPTL 4-1.2(a)(2)(D)*, 69 ALB. L. REV. 947, 949 (2006) (arguing that posthumously conceived children, considered as non-marital children, may be largely deprived of their inheritance rights under this statute).

statutes generally concerning legitimacy may also be relevant to determining paternity of children born by way of reproductive technology.

2. Determining Maternity: “Are You My Mother?”

Unlike paternity, which was subject to the court’s determination even before the advent of reproductive technology,¹⁷⁶ maternity was typically presumed to vest in the woman who gave birth to the child.¹⁷⁷ The rationale behind the differential treatment for male and female parenthood was that a woman could become pregnant by any man, but she could not give birth to a child that was not her own.¹⁷⁸ As discussed above, this presumption is no longer intact because advances in reproductive technologies allow genetic and gestational motherhood to be split between two distinct women.¹⁷⁹ The case and statutes below illustrate New York’s response to the challenges facing the maternity presumption.

a. New York Case Law Addressing the Question of Maternity Where Assisted Reproduction is Involved

The question of maternity in cases of assisted reproduction can arise where conception is achieved using donated eggs.¹⁸⁰ In the case of *McDonald v. McDonald*¹⁸¹—one of the only New York cases dealing with

¹⁷⁶ See *supra* Part II.A. (discussing reproductive technology and the effect that it has had in the legal arena).

¹⁷⁷ See Howard-Potter, *supra* note 53, at 30 (outlining the problems with the common law presumptions of maternity in light of the advances in reproductive technology); see also Mary Lynne Birk, *Modern Reproductive Technology and Motherhood: The Search for Common Ground and the Recognition of Difference*, 62 U. CIN. L. REV. 1623, 1646 (highlighting that the common law never questioned the definition of maternity, believing that maternity was “easy to define both legally and socially—there was never a question that the birth mother was the child’s natural mother”).

¹⁷⁸ Howard-Potter, *supra* note 53, at 30 (explaining that the common law presumptions of maternity were based on the woman’s physical inability to give birth to a child that is not biologically related to her); see also Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 673 (explaining that the traditional concept that a woman was a mother stemmed from “the simultaneity of biological and social motherhood,” and that the separation of biological and social motherhood through reproductive technology “threatens traditional understandings of ‘mother’”).

¹⁷⁹ See McAllister, *supra* note 7, at 88–91 (discussing the difference between “gestational” and “genetic” motherhood and the parental ties that are associated with each); see also Shapo, *supra* note 30, at 1096–1101 (discussing generally the impact of reproductive technologies on the legal status of both parents and the legal status of parents on inheritance rights).

¹⁸⁰ See Shapo, *supra* note 30, at 1137–38 (noting that “the gestational woman would be the presumed mother,” which would mean “the child might inherit from the sperm donor . . . but not from the egg donor to the same embryo”); see also Krista Sirola, Comment, *Are You My Mother? Defending the Rights of Intended Parents in Gestational Surrogacy Arrangements in Pennsylvania*, 14 AM. U. J. GENDER SOC. POL’Y & L. 131, 156 (arguing that Pennsylvania’s surrogacy statute should resemble the UPA by abandoning the doctrine of presumption and recognize intended parents).

¹⁸¹ 608 N.Y.S.2d 477 (App. Div. 1994).

a child conceived by IVF with egg donation—the court departed from the traditional presumption of maternity.¹⁸² Because New York does not have IVF statutes, the court was left to determine this issue on its own.¹⁸³ The plaintiff-husband in this case moved for “sole custody of the infant issue” on the grounds that he was the “only genetic parent available.”¹⁸⁴ The court determined that either a genetic or a gestational connection was sufficient to establish a mother-child relationship, but that maternity should be determined by the parties’ intent where the two roles did not coincide in one woman.¹⁸⁵ Thus, the court held the defendant-wife (the child’s gestational mother) to be the “natural mother” of the child in question and granted her temporary custody.¹⁸⁶

b. New York Statutes Addressing the Question of Maternity Where Assisted Reproduction is Involved

Though new challenges facing the maternity presumption are numerous, the statutes that address them are few in number. The New York statutes that are most relevant to this issue are the corresponding maternity provisions in the above-mentioned paternity statutes. Section 121(2) of the DRL, for example, defines “birth mother” as the “woman who gives birth to a child pursuant to a surrogate parenting contract.”¹⁸⁷ Section 121(3) defines a “genetic mother” as a “woman who provides an ovum for the birth of a child born pursuant to a surrogate parenting contract.”¹⁸⁸ However, given the impact of surrogacy on the common law presumption of maternity, two additional sections of the DRL, Sections 122 and 123, require recognition because they respectively deem surrogacy contracts to be against public policy and prohibited under New York law.¹⁸⁹

¹⁸² See Howard-Potter, *supra* note 53, at 30 (noting that the presumption that someone other than the woman who gave birth could be the mother of the child was inconceivable before the use of ARTs); see also Shapo, *supra* note 30, at 1138 (reviewing *McDonald*, asserting that the court determined maternity based on the parties’ intent as opposed to applying the presumption of maternity).

¹⁸³ See *Kass v. Kass*, 696 N.E.2d 174, 178–79 (N.Y. 1998) (citing authorities in other jurisdictions as well as law review articles to deal with a New York IVF custody dispute because of a lack of relevant state statutes); see also Shapo, *supra* note 30, at 1138 (noting that plaintiff relied on the a California case since New York did not have an IVF statute).

¹⁸⁴ *McDonald*, 608 N.Y.S.2d at 479.

¹⁸⁵ *Id.* at 480 (quoting *Johnson v. Calvert*, 5 Cal. 4th 84, 104 (1993) (Kennard, J., dissenting)). The court recognized that the use of reproductive technology in this case effectively divided the “two aspects of the female role in reproduction,” (i.e. the genetic and gestational) between two women. *Id.* The court determined that the woman who intended to “bring about the birth of a child . . . [and] to raise as her own” is the “natural mother” of the child. *Id.* at 479–80.

¹⁸⁶ *McDonald*, 608 N.Y.S.2d at 480.

¹⁸⁷ N.Y. DOM. REL. LAW § 121(2) (McKinney 2008).

¹⁸⁸ N.Y. DOM. REL. LAW § 121(3).

¹⁸⁹ See N.Y. DOM. REL. LAW § 122 (McKinney 2008) (explaining that surrogate parenting

Additionally, under Section 4-1.2(a)(1) of the EPTL, a non-marital child is considered “the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred.”¹⁹⁰ Thus, questions of maternity arising in cases employing reproductive technologies, other than surrogacy, will require the court’s determination.

3. The “Non-Traditional” Family

The so-called “traditional family,” which Anglo-American law has historically protected,¹⁹¹ is centered upon the cohabitation and procreation between a married man and woman.¹⁹² Reproductive technologies have challenged this tradition by allowing procreation to occur outside of the marital union, outside of the male-female union, and even outside of the human body.¹⁹³ The law has resisted recognizing alternative family units in favor of protecting the “institution of marriage” and the best interests of children.¹⁹⁴ However, as these technologies continue to advance and to grow in popularity, the traditional concept of family is forced to adapt.¹⁹⁵ The cases and statutes below reflect the ways in which New York’s

contracts are void, contrary to public policy, and unenforceable); *see also* N.Y. DOM. REL. LAW § 123 (McKinney 2008) (explaining the punishment for forming or assisting in the formation of a surrogate parenting contract for money).

¹⁹⁰ N.Y. EST. POWERS & TRUSTS LAW § 4-1.2(a)(1) (McKinney 2008).

¹⁹¹ *See* KINDREGAN & MCBRIEN I, *supra* note 8, at 1 (explaining why and how the “traditional family” was protected under Anglo-American law through statutes that governed marriage); *see also* Barbara J. Cox, *Alternative Families: Obtaining Traditional Family Benefits Through Litigation, Legislation and Collective Bargaining*, 15 WIS. WOMEN’S L.J. 93, 93 (2000) (emphasizing that “[o]ver time, [the traditional family] has obtained far-reaching legal protections and societal benefits”).

¹⁹² *See* Kirby, *supra* note 1, at 4 (reviewing the history of family law in the context of considering how the law has changed to accommodate non-traditional families); *see also* Cox, *supra* note 191, at 93 (“[T]raditional families most frequently are nuclear families consisting of the husband, the wife, and their dependent children.”).

¹⁹³ *See* Kirby, *supra* note 1, at 4 (citing changes in procreative unions, such as homosexual parenting and *in vitro* pregnancies); *see also* KINDREGAN & MCBRIEN I, *supra* note 8, at 8–10 (listing the numerous possibly non-traditional families that can arise from the use of assisted reproduction).

¹⁹⁴ Siobhan Morrissey, *The New Neighbors: Domestic Relations Law Struggles to Catch Up with Changes in Family Life*, 88 A.B.A. J. 36, 36 (2002). “[N]ew family structures are reshaping traditional views. . . . But rethinking domestic relations law is likely to be a lengthy, contentious process.” *Id.* The rationale behind protecting the traditional family is rooted in two propositions. KINDREGAN & MCBRIEN I, *supra* note 8, at 5. The first is that the “institution of marriage provides the important legal and normative link between heterosexual intercourse and procreation on the one hand and family responsibilities on the other.” *Id.* (quoting *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 955 (Mass. 2003) (Cordy, J., dissenting)). The second proposition is that a child’s interest is best served in being conceived and raised in a heterosexual marital family. *Id.*

¹⁹⁵ *See* McAllister, *supra* note 7, at 111–12 (prognosticating potential adaptations in the Uniform Status of Children of Assisted Conception Act (USCACA) as reproductive technologies further develop); *see also* Emily Stark, Comment, *Born to No Mother: In Re Roberto D.B. and Equal Protection for Gestational Surrogates Rebutting Maternity*, 16 AM. U. J. GENDER SOC. POL’Y & L. 283, 296–97 (2008) (noting that courts grapple with the concept of family when dealing with reproductive advancements).

conception of the traditional family has adapted thus far.

a. New York Case Law Addressing the “Non-Traditional” Family and Assisted Reproduction

Because many instances of reproductive assistance involve non-traditional families comprised of various combinations of biological parents, social parents, and gestational parents, adoption rights are very relevant to cases involving reproductive technology.¹⁹⁶ The case *In re Jacob*¹⁹⁷ played a pivotal role in determining the parental rights of a parent’s unmarried partner.¹⁹⁸ The court held that an “unmarried partner of a child’s biological mother, whether heterosexual or homosexual, who is raising the child together with the biological parent,” is entitled to adopt under DRL Section 110.¹⁹⁹ The court reasoned that deciding otherwise would mean “thousands of New York [c]hildren . . . raised in homes headed by two unmarried persons” would be prevented from having two legal parents.²⁰⁰ Given the vast number of non-traditional families who procreate via reproductive technology, this decision is especially pertinent.²⁰¹

The case of *Karin T. v. Michael T.*²⁰² also involved a non-traditional family, but unlike *Jacob*, it involved a member of the couple trying to avoid parental responsibilities, rather trying to acquire them.²⁰³ The

¹⁹⁶ See Shapo, *supra* note 30, at 1126–29 (discussing instances of reproductive technology in which adoption may be desired or needed and may be complicated by the non-traditional nature of the family in question); see also Valerie L. Baker, *Surrogacy Legislation in California: One Physician’s View of the Role of Law*, 28 U.S.F. L. REV. 603, 603–04 (1994) (likening surrogacy scenarios to adoption because the social parent is not the biological parent).

¹⁹⁷ 660 N.E.2d 397 (N.Y. 1995).

¹⁹⁸ *Id.* at 398 (asserting that the right of a single person to adopt under DRL § 110 extends to the right of unmarried partners, both homosexual and heterosexual, of the biological mother of a child, to adopt).

¹⁹⁹ *Id.*; see N.Y. DOM. REL. LAW § 121(2) (McKinney 2008) (providing a definition for “genetic father”).

²⁰⁰ *In re Jacob*, 660 N.E.2d 397, 398 (N.Y. 1995).

²⁰¹ See Shapo, *supra* note 30, at 1127 (suggesting that the court recognized the realities of a large number of non-traditional families in deciding to interpret these adoption statutes broadly); see also Rachel Alyson Meltzer, *Creating Family-Sensitive Schools*, 15 KAN. J.L. & PUB. POL’Y 87, 87 (2005) (stating that 25,000 babies are born through IVF each year).

²⁰² 484 N.Y.S.2d 780, 781 (Fam. Ct. 1985) (detailing the unorthodox union between a lesbian and a transgendered woman that entered into a relationship and decided to marry and birth children); see *New*, *supra* note 16, at 773 (recounting the non-traditional familial structure of two lesbians, a child produced through *in vitro* fertilization of one of the women’s ovum, and their joint interests in the child).

²⁰³ See *Karin T.*, 484 N.Y.S.2d at 782 (recognizing that the New York DRL has limited ability to determine all the obligations and responsibilities of the female respondent regarding the child created during the supposed marriage to the female petitioner); see also *Beth R. v. Donna M.*, 853 N.Y.S.2d 501, 502 (Sup. Ct. 2008) (referencing a same-sex marriage in which one party claimed the marriage was void with no accompanying responsibilities while the other party sought child support for the children).

respondent was a female, who attempted to change her feminine identity so that she could, instead, live as a man.²⁰⁴ While respondent was living as a man, respondent married the petitioner and consented to having children by artificial insemination.²⁰⁵ Petitioner later averred that she was not a parent; therefore she was not responsible for supporting the children on the grounds that she was not biologically related to them and had not legally adopted them.²⁰⁶ Relying on Black's Law Dictionary's definition of "parent,"²⁰⁷ the court held that the petitioner was indeed a "parent" and referred the case to the Hearing Examiner to determine the level of support she could be responsible for.²⁰⁸

b. New York Statutes Addressing the "Non-Traditional" Family and Assisted Reproduction

The state legislature has not expressly addressed the issues surrounding legal rights within the context of non-traditional families; however, as with paternity and maternity, other New York statutes are relevant. Because of the nature of non-traditional families, the non-marital child statute, N.Y. EPTL Section 4-1.2, is relevant here.²⁰⁹ Additionally, the New York

born before and during the marriage).

²⁰⁴ See *Karin T.*, 484 N.Y.S.2d at 781 (noting respondent's dissatisfaction with her biological female identity and her decision to change her gender by acquiring a man's name, dressing like a man, and obtaining so-called man's work); see also Kimberly P. Carr, Comment, *Alison D. v. Virginia M.: Neglecting The Best Interests of the Child in a Non-Traditional Family*, 58 BROOK. L. REV. 1021, 1021 (1992) (recognizing that a legally married husband and wife and children born within the confines of that marriage do not represent all contemporary familial structures).

²⁰⁵ See *Karin T.*, 484 N.Y.S.2d at 781 (detailing the evolution of the petitioner's and respondent's same-sex marriage and later child bearing); see also Laurence C. Nolan, *Legal Strangers and The Duty of Support: Beyond The Biological Tie--But How Far Beyond the Marital Tie?*, 41 SANTA CLARA L. REV. 1, 17-18 (2000) (referencing the lesbian relationship between Karin T. and Michael T. and the two children they had via artificial insemination of Karin T.).

²⁰⁶ See *Karin T.*, 484 N.Y.S.2d at 784 (identifying the respondent's attempt to escape a child support liability on the grounds that she was not the biological or adoptive parent of the petitioner's children); see also J.C. v. C.T., 711 N.Y.S.2d 295, 296 (Fam. Ct. 2000) (highlighting that a respondent who lacks a biological or adoptive relationship to children that petitioner produced during the parties' same-sex marriage leaves the respondent without standing to claim parental rights over the children).

²⁰⁷ See *Karin T.*, 484 N.Y.S.2d at 784 (reciting the definition of "parent" to be "one who procreates, begets or brings forth offspring"); see also BALLENTINE'S LAW DICTIONARY 1190 (3d ed. 1969) (defining parent as "the father or mother" without necessitating a biological relationship).

²⁰⁸ See *Karin T.*, 484 N.Y.S.2d at 784 (referring to the court's holding which determined the petitioner was a "parent" to respondent's biological child for child support purposes); see also Caroline P. Blair, Note, *It's More Than a One-Night Stand: Why a Promise to Parent Should Obligate a Former Lesbian Partner to Pay Child Support in the Absence of a Statutory Requirement*, 39 SUFFOLK U. L. REV. 465, 469 (asserting there is no statutory definition for the term parent, yet courts generally determine parenthood based on a biological or adoptive status with the child).

²⁰⁹ See N.Y. EST. POWERS & TRUSTS LAW § 4-1.2 (McKinney 2008) (determining that a non-marital child is still legitimately born to its mother and father, and thus, the child may inherit from its mother, its maternal kindred, its father, and its paternal kindred); see also *supra* notes 164-68, 181-86, and accompanying text (pointing to *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356, 356 (App. Div. 1994)

adoption statutes, considered in *In re Jacob*,²¹⁰ are appropriately considered in the context of non-traditional families. Specifically, Section 110 of the DRL,²¹¹ and the *Jacob* court's interpretation of the statute,²¹² which expanded the right of children born by reproductive technologies to have two legal parents, may be considered.²¹³ Section 110, in conjunction with Section 117(1)(b) and (c) of the DRL, establishes the rights of an adopted child, who was born by reproductive technology, to inherit from both his birth parent(s) and his adoptive parent(s).²¹⁴

B. Legal Status of Children Conceived Through Assisted Reproduction

1. Legitimacy of the Child Generally

New York law regulating a child's legal status still maintains a vestige of the common law in that it grants "illegitimate" (non-marital) children fewer rights than legitimate children.²¹⁵ The advance of reproductive technologies—specifically AID—has challenged this method of determining legitimacy by making it possible for a non-marital child to be born to a marital couple with the help of a donor's contribution.²¹⁶ As

and *McDonald v. McDonald*, 608 N.Y.S.2d 477, 478–79 (App. Div. 1994), since both cases entail a respondent father's use of his legal paternity to gain parental rights to a child birthed by a lesbian petitioner).

²¹⁰ 660 N.E.2d 397, 398 (N.Y. 1995) (demonstrating that the court permits unmarried individuals and homosexual individuals to adopt the children of their partner because such adoptions are consistent with New York's adoption laws). *But see* *Beth R. v. Donna M.*, 853 N.Y.S.2d 501, 725–26 (2008) (illustrating a homosexual respondent who did not adopt the petitioner's children, causing subsequent ambiguity about the respondent's child support legal obligations).

²¹¹ See N.Y. DOM. REL. LAW § 110 (McKinney 2008) (specifying the parties who may adopt a child, indicating an unmarried person or married couple may adopt a child, and noting a separated spouse may continue with an existing foster care placement for the purpose of adoption). *But see* *Debra H. v. Janice R.*, No. 106569/08, 2008 N.Y. Misc. LEXIS 6367, at *6 (Sup. Ct. Oct. 2, 2008) (displaying an unmarried lesbian's desire and legal ability to adopt the child of her lesbian partner).

²¹² See *supra* note 198–201 and accompanying text (demonstrating how courts are interpreting the DRL broadly to reflect changes in the family and how, as a result, adoptive parents are treated much the same as birth parents under the law).

²¹³ See *supra* note 200 and accompanying text. In *In re Jacob* an adult unmarried person that conceives a child through artificial insemination using an unknown sperm donor qualifies as a parent under the DRL. *Id.*

²¹⁴ See N.Y. DOM. REL. LAW § 110 (describing how once an adoption proceeding is finalized, the adoptive parent acquires all the rights and responsibilities of a parent, including those related to inheritance); see also N.Y. DOM. REL. LAW § 117 (McKinney 2008) (stating that once a child has been legally adopted, he or she has inheritance rights from his adoptive parents and, under special enumerated circumstances, can retain inheritance rights from his birthparents).

²¹⁵ See N.Y. EST. POWERS & TRUSTS LAW § 4-1.2 (McKinney 2008) (discussing the rights of children born of a marital relationship as opposed to those rights of children not born of a marital relationship); see also *CUSINE*, *supra* note 57, at 59 (referring to states, like New York, that have maintained the archaic tradition of treating non-marital children as illegitimate children, granting them fewer rights).

²¹⁶ See *Heard*, *supra* note 7, at 939–40 (discussing the ways in which a child conceived by

discussed, New York inheritance law now specifically addresses the inheritance rights of a child born by AID,²¹⁷ but, before this statute was passed, New York courts wrestled with this question of legitimacy. The cases below reflect the varying responses.

a. New York Case Law Addressing Child Legitimacy Where Assisted Reproduction is Involved

Even after the notion that AID constituted adultery was abandoned, courts still disputed the legal status of a child born by the technique.²¹⁸ In 1948, the New York Supreme Court decided *Strnad v. Strnad*,²¹⁹ holding that a child conceived by AID, where the husband had consented, was not an illegitimate child.²²⁰ In making its decision, the court drew an analogy between this child born by assisted reproduction and a “child born out of wedlock” who is made legitimate by the “marriage of the interested parties.”²²¹ Additionally, the court here likened this child to one who has been “potentially” or “semi” adopted by the consenting husband.²²²

Nearly twenty years later, despite further advances made in science, the law took a large step backwards when the *Strnad* decision was rejected by another New York case.²²³ In *Gursky v. Gursky*,²²⁴ the New York Supreme Court held, contrary to *Strnad*, that a child who is conceived through AID is not the legitimate issue of the husband, even if the husband consents.²²⁵ In deciding this way, the court considered the concept, “deeply imbedded

reproductive assistance could be considered illegitimate and be deprived of his inheritance rights); see also *Hagood v. Hagood*, 186 S.W. 220, 225 (Tex. Civ. App. 1916) (explaining that in order to be considered a class, individuals must be able to be designated by the same general name, such as “children,” “brothers,” or “sisters”).

²¹⁷ See Shapo, *supra* note 30, at 1112 (describing inheritance law as it applies to a child conceived through AID); see also N.Y. DOM. REL. LAW § 73 (McKinney 2008) (stating that any child born via AI is legitimate).

²¹⁸ Karin Mika & Bonnie Hurst, *One Way to be Born? Legislative Inaction and the Posthumous Child*, 79 MARQ. L. REV. 993, 998 (1996) (explaining that courts have disputed the status of children conceived through AID, sometimes calling them “adopted” or “semi-adopted”); see also *Strnad v. Strnad*, 78 N.Y.S.2d 390, 392 (Sup. Ct. 1948) (concluding that the court will not rule on property rights concerning children born via AI—the better forums for those issues are sociology, morality, and religion).

²¹⁹ 78 N.Y.S.2d 390.

²²⁰ *Id.* at 392 (holding that if the husband did not consent to the AID procedure the child was not legitimate).

²²¹ *Id.*

²²² *Id.* at 391–92.

²²³ See Mika & Hurst, *supra* note 218, at 998 (recognizing the decision in *Gursky v. Gursky*, 242 N.Y.S.2d 406 (Sup. Ct. 1963) as rejecting the *Strnad* decision); see also Kelly L. Frey, *New Reproductive Technologies: The Legal Problem and a Solution*, 49 TENN. L. REV. 303, 314 (1982) (noting the different conclusions reached by the courts in *Strnad* and *Gursky*).

²²⁴ 242 N.Y.S.2d 406 (Sup. Ct. 1963).

²²⁵ *Id.* at 411.

in the law,” that “a child who is begotten through a father who is not the mother’s husband is deemed to be illegitimate.”²²⁶ Furthermore, the court asserted that the decision in *Strnad* was not supported by legal precedent.²²⁷

After *Gursky*, New York adopted a more progressive approach to a child born by AID through a decision by the New York Surrogate’s court.²²⁸ In *In re Adoption of Anonymous*,²²⁹ the court expressly rejected the reasoning of the *Gursky* court, asserting that the “historical concept” that the court relied upon was developed long before the advent of AID.²³⁰ Instead, this court relied upon New York’s “strong policy in favor of legitimacy” and held that a “child born by consensual AID during a valid marriage is a legitimate child entitled to the rights and privileges of a naturally conceived child of the same marriage.”²³¹

b. New York Statutes Addressing Child Legitimacy Where Assisted Reproduction is Involved

Both the non-marital children statute²³² and the New York adoption laws under the DRL²³³ are relevant to determining the legitimacy of children conceived through reproductive technology. These statutes are especially helpful in determining legitimacy of children conceived by assisted methods of reproduction other than AID. The legitimacy of a child born by AID, to a married woman, is expressly determined in Section 73 of the DRL²³⁴ (adopted in 1974, just one year after *In Re Anonymous*).²³⁵ The statute sets forth that such child “shall be deemed the legitimate, birth child of the husband and his wife for all purposes.”²³⁶ The broad language of this statute allows an inference to be drawn about the inheritance rights of these children.²³⁷ However, Section 73 applies only to children born by AID to a

²²⁶ *Id.* at 408.

²²⁷ *Id.* at 410–11 (stating that the court in *Strnad* had no legal precedent to support its decision).

²²⁸ See Mika & Hurst, *supra* note 218, at 998–99 (reviewing the case of *In Re Adoption of Anonymous*, 345 N.Y.S.2d 430 (Sur. Ct. 1973)); see also Joseph Silvos, *Artificial Insemination: A Legislative Remedy*, 3 W. ST. U. L. REV. 48, 60 (1975) (noting the more forward-thinking approach of the *In Re Adoption of Anonymous* court).

²²⁹ 345 N.Y.S.2d 430 (Sur. Ct. 1973).

²³⁰ *Id.* at 434.

²³¹ *Id.* at 435–36.

²³² See N.Y. EST. POWERS & TRUSTS LAW § 4-1.2 (McKinney 2008).

²³³ *Supra* notes 211, 214 and accompanying text (discussing DRL §§ 110, 117).

²³⁴ N.Y. DOM. REL. LAW § 73 (McKinney 2008).

²³⁵ *In re Martin B.*, 841 N.Y.S.2d 207, 208–09 (Sur. Ct. 2007).

²³⁶ N.Y. DOM. REL. LAW § 73.

²³⁷ *Id.* Under the statute, the child is deemed the legitimate and natural child of the husband and wife “for all purposes.” *Id.* The inheritance laws of New York allow a “legitimate” child to inherit from

married woman.²³⁸ Thus, alternative statutory and decisional law must be used to determine the legitimacy and inheritance rights of non-marital children conceived through AID.

2. Child as Testate Beneficiary or Beneficiary of *Inter Vivos* Transfer

Despite the number of New York cases addressing legal status of children born by reproductive technology, and the legal status of their parents,²³⁹ the question of their inheritance rights is still independently disputed. In terms of statutory inheritance, New York statutes only address the inheritance rights of children born to married couples by AID.²⁴⁰ Thus, the New York courts have been left to determine issues of inheritance involving children born through every other reproductive technology, at least until the Legislature responds.

a. New York Case Law Addressing a Child Conceived Through Assisted Reproduction as Testate Beneficiary or Beneficiary of *Inter Vivos* Transfer

In 1986, the New York Surrogate's court decided *Estate of Gordon*,²⁴¹ in which a fiduciary sought to exclude two children born to a married couple by AID as contingent remaindermen of testamentary trusts.²⁴² Relying on the New York AID statute, DRL Section 73,²⁴³ and the *In re Anonymous*²⁴⁴ decision, the court concluded that the children objectants were "issue of decedent's son" at the time of their births.²⁴⁵

Continuing the trend of legitimizing children conceived by assisted reproduction, in 2005, the New York Surrogate decided *In re Doe*.²⁴⁶

his or her mother, father, maternal kindred, or paternal kindred. N.Y. EST. POWERS & TRUSTS LAW § 4-1.2 (McKinney 2008). Thus, the right to inherit can be included as part of the child's legitimacy "for all purposes." N.Y. DOM. REL. LAW § 73.

²³⁸ N.Y. DOM. REL. LAW § 73.

²³⁹ See generally *supra* Parts II.A. and II.B. and accompanying notes (discussing case history).

²⁴⁰ See *supra* notes 218–31 and accompanying text (commenting on case history in the AID context); see also N.Y. DOM. REL. LAW § 73 ("Any child born to a married woman by means of artificial insemination . . . shall be deemed the legitimate, birth child of the husband and his wife for all purposes.").

²⁴¹ 501 N.Y.S.2d 969 (Sur. Ct. 1986).

²⁴² *Id.* at 970.

²⁴³ N.Y. DOM. REL. LAW § 73 (establishing that a child born to a married woman by AID, with the consent of her husband, is a legitimate and natural child of the husband and wife for all purposes).

²⁴⁴ 345 N.Y.S.2d 430 (Sur. Ct. 1973) (holding that a child born of consensual AID during a legitimate marriage is a legitimate child entitled to the rights and privileges of a naturally conceived child of the same marriage).

²⁴⁵ *Gordon*, 501 N.Y.S.2d at 971.

²⁴⁶ 793 N.Y.S.2d 878 (Sur. Ct. 2005) (determining that children conceived by surrogacy were not adopted and, thus, not excluded from benefits of trust via an adoption exclusion written into the trusts.)

Trustees sought construction of an *inter vivos* trust by the court to determine the eligibility of children born pursuant to a surrogacy agreement from an egg fertilized with the settlor's son-in-law's sperm as beneficiaries to the trust.²⁴⁷ Though the settlor expressly provided that adopted children should not be recognized as beneficiaries, the court held that this specification did not call for the exclusion of children born by all reproductive technologies.²⁴⁸ Though surrogacy contracts are prohibited in New York under the DRL,²⁴⁹ the enforcement of the contract was not at issue here.

In July of 2007, the New York Surrogate's court again addressed the question of whether children born out of assisted reproduction can participate as beneficiaries to an *inter vivos* trust, but this time it considered the rights of a posthumously conceived child.²⁵⁰ In *In Re Martin B.*,²⁵¹ the Surrogate recognized the legitimacy of a child conceived by IVF using cryopreserved sperm of the decedent's son and asserted that the child qualified as "issue" and "descendants" in the context of an *inter vivos* trust agreement.²⁵² In so deciding, the Surrogate applied the rationale of *In re Anonymous* and that of Section 73 of the DRL, "if an individual considers a child to be his or her own, society through its laws should do so as well."²⁵³

Though the decision of *Martin B.* is critical to establishing the rights of posthumous children, Surrogate Roth's discussion of the lacking legislative response in this area of the law is perhaps even more valuable. The bulk of Surrogate Roth's decision focuses on the lack of legislation in New York and the District of Columbia that addresses the status of post-conceived children and on the existence of such statutes in other states.²⁵⁴ Roth

²⁴⁷ *Id.* at 879.

²⁴⁸ *Id.* at 881 (expressing that the language of the trust, excluding adopted children, was not intended to exclude all non-blood relations, nor was it intended to exclude children born by assisted reproduction).

²⁴⁹ N.Y. DOM. REL. LAW § 122 (McKinney 2008) (declaring surrogate parenting contracts contrary to the public policy of the state).

²⁵⁰ See *supra* notes 124–48 and accompanying text (discussing cryopreservation and the issues surrounding posthumous conception of a child).

²⁵¹ 841 N.Y.S.2d 207 (Sur. Ct. 2007). In the case of *Martin B.*, trustees brought an action to determine whether children conceived through IVF using cryopreserved sperm of the grantor's son could be included in a class of "issue" or "descendants" named in a trust. *Id.*

²⁵² *Id.* at 211–12.

²⁵³ *Id.* at 211.

²⁵⁴ See *id.* (noting that certain jurisdictions' legislatures, unlike those in New York and the District of Columbia, directly address the inheritance rights of post-conceived children); see also Robert Matthew Harper, *Dead Hand Problem: Why New York's Estates, Powers and Trusts Law Should Be Amended to Treat Posthumously Conceived Children as Decedents' Issue and Descendants*, 21 QUINNPIAC PROB. L.J., 267, 293 (2008) ("Considering the antiquated manner in which the EPTL addresses the inheritance rights of posthumously conceived children, the New York Legislature must act to amend New York's statute.").

recognized Louisiana, California, and Florida, as the three states expressly addressing the question with their own legislation, and acknowledged the other seven states that have adopted the Uniform Parentage Act (UPA). Though the laws differ among states, generally a post-conceived child is allowed to inherit where there is consent (from one or both parents) to its conception after death, or the child is expressly provided for in the will.²⁵⁵ Additionally, both the Louisiana statute and the California statute limit the time after the donor's death that this post-conceived child may be born.²⁵⁶ Surrogate Roth therefore concluded that the existing laws around the country illustrate the need for "comprehensive legislation" to address and resolve issues raised "by advances in biotechnology."²⁵⁷

b. New York Statutes Addressing a Child Conceived Through Assisted Reproduction as Testate Beneficiary or Beneficiary of *Inter Vivos* Transfer

Like her right to stand as an intestate beneficiary, the right of a child conceived by assisted reproduction to stand as a testate beneficiary, or as a beneficiary of an *inter vivos* trust, is primarily determined by her legitimacy and the legal status of her parents.²⁵⁸ However, some New York statutes regarding the testamentary distribution of property also apply to

²⁵⁵ *In re Martin B.*, 841 N.Y.S.2d at 210. Louisiana Civil Code § 9:391.1 provides that a post-conceived child may inherit from his father if the father consented in writing to the wife's use of his semen and the child was born within three years of the father's death. *Id.* The statute also allows a person adversely affected to challenge paternity within one year of the child's birth. *Id.* Similarly, California Probate Code § 249.5 states that a post-conceived child may inherit if the deceased parent consented in writing to the posthumous use of genetic material and designated a person to control its use. *Id.* Such designee must be given written notice of the designation and the child must have been conceived within two years of decedent's death. *Id.* Florida's Annotated Statute § 742.17 allows a post-conceived child to inherit only if the deceased parent explicitly provided for such child under his or her will. *Id.* at 211. The statute also requires a written agreement by the couple and the treating physician for the disposition of the couple's eggs or semen in the event of death or divorce. *Id.* However, New Hampshire's Revised Statutes Annotated § 561:1 has been interpreted to mean that a child born via artificial insemination after her father's death, despite the father's explicit consent to have his daughter be recognized as his child by the "fullest extent of the law," is ineligible to inherit from her father as his surviving issue. *Eng Khabbaz v. Soc. Sec. Admin.*, 930 A.2d 1180, 1182–84 (N.H. 2007).

²⁵⁶ *In re Martin B.*, 841 N.Y.S.2d at 210 (noting that Louisiana requires that the child be born within three years of the decedent's death and California requires that the child be born within two years of the decedent's death); see Harper, *supra* note 254, at 273–74 (stating that, according to § 2.5 of the Restatement (Third) of Property: Wills and Other Donative Transfers, "an individual is the child of his or her genetic parents," so long as certain conditions are met, including that "a posthumously conceived child 'must be born within a reasonable time after the decedent's death in circumstances indicating that the decedent would have approved of the child's right to inherit'" (emphasis added)).

²⁵⁷ *In re Martin B.*, 841 N.Y.S.2d at 212.

²⁵⁸ See *supra* notes 239–45 and accompanying text (discussing the rights of children born by assisted reproduction); see also *Laura WW. v. Peter WW.*, 856 N.Y.S.2d 258, 261 (App. Div. 2008) (noting that DRL § 73 allows "married couples who utilize AID to have a child with assurances that the child will be, for all purposes, considered the legitimate child of both the woman and her husband").

children born by assisted reproduction.

Sections 2-1.3²⁵⁹ and 5-3.2²⁶⁰ of the N.Y. EPTL are two relevant New York statutes addressing this issue. The former denotes the rights of adopted children, children born after the will was executed, and non-marital children, to be considered as part of a class of "issue," "children," "descendants," "heirs," "heirs at law," "next of kin," and "distributees," unless the creator expresses a contrary intention.²⁶¹ Given that children conceived by assisted reproduction can fall into any or all of the classes expressly included under this statute, the statute is relevant to defining their inheritance rights. The latter of the two statutes, directing the treatment of a child born after the creation of a will,²⁶² mainly affects children conceived by IVF using cryopreserved reproductive material. The 2007 amendment to Section 5-3.2(a)(2)(b), previously discussed, effectively excludes any posthumously conceived children from the class protected under the statute.

3. Child Conceived by Assisted Reproduction as Intestate Beneficiary

To date New York courts have not expressly addressed the rights of a child born by assisted reproduction as an intestate beneficiary. These rights are predominantly tied to the New York intestacy statute, EPTL Section 4-1.1,²⁶³ and the definitions honored by the EPTL.²⁶⁴ Section 4-1.1 allows the "issue" of a decedent to participate as intestate beneficiaries.²⁶⁵ The term "issue," as applied in the EPTL, is defined in Section 1-2.10 as the "descendants in any degree from a common ancestor," including "adopted children."²⁶⁶ Thus, again, this child's intestate inheritance rights are directly tied to his legitimacy and the legal status of his parents.²⁶⁷ Therefore, all of the statutes relevant to determining the child's legitimacy are relevant here, including: DRL Sections 73, 110, 111(b), 124, 122, and

²⁵⁹ N.Y. EST. POWERS & TRUSTS LAW § 2-1.3 (McKinney 2008) (addressing the rights of adopted children and posthumous children as members of a class).

²⁶⁰ N.Y. EST. POWERS & TRUSTS LAW § 5-3.2 (McKinney 2008) (directing the treatment of a child born after the execution of a will).

²⁶¹ N.Y. EST. POWERS & TRUSTS LAW § 2-1.3.

²⁶² N.Y. EST. POWERS & TRUSTS LAW § 5-3.2.

²⁶³ N.Y. EST. POWERS & TRUSTS LAW § 4-1.1 (McKinney 2008) (presenting the fact that distributing to "issue" is amongst the scenarios for distribution of an intestate estate).

²⁶⁴ N.Y. EST. POWERS & TRUSTS LAW § 1-2.10 (McKinney 2008) (defining "issue" as "descendants in any degree from a common ancestor" that "includ[es] adopted children").

²⁶⁵ N.Y. EST. POWERS & TRUSTS LAW § 4-1.1.

²⁶⁶ N.Y. EST. POWERS & TRUSTS LAW § 1-2.10.

²⁶⁷ See N.Y. EST. POWERS & TRUSTS LAW § 4-1.2 (McKinney 2008) (stating the rules for inheritance by non-marital children).

EPTL Section 4-1.2.²⁶⁸

C. *Inheritance of Reproductive Material*

1. Ownership of Reproductive Materials

Though several states have adopted statutes addressing the disposition of stored/preserved embryos, New York has not. Additionally, New York decisional law on the issue is limited and evolving slowly.²⁶⁹ However, the state's courts have addressed the issue on a few occasions.

a. New York Case Law Addressing Ownership of Reproductive Materials

A very early case involving IVF presents this ownership question as a peripheral issue. In *Del Zio v. Presbyterian Hospital*,²⁷⁰ plaintiffs sued the defendant doctor for terminating their IVF procedure without their consent.²⁷¹ In addition to a claim of intentional infliction of emotional distress, plaintiffs brought a conversion claim against the defendants for the destruction of their "property" (i.e., the wife's ova that were destroyed).²⁷² Although the jury found in favor of the defendant on the conversion claim, this is a very early example of the conception of reproductive material as legal property.

In 1998, the New York Court of Appeals was faced with its first property dispute over frozen pre-zygotes produced by IVF, in the case of *Kass v. Kass*.²⁷³ The divorced appellant, Maureen Kass, sought sole custody of five cryopreserved pre-zygotes that were produced during the couple's marriage.²⁷⁴ The parties previously entered into an agreement stating that the pre-zygotes in question would be donated to an IVF program for research purposes.²⁷⁵ Judge Kaye's decision in this case mirrors Surrogate Roth's decision in *Martin B.*²⁷⁶ in the way that it considers existing law and

²⁶⁸ See generally *supra* notes 169–238 and accompanying text. Essentially all of the statutes that have been addressed above as relevant to determining the legal status of a child or his parents are peripherally relevant to a child's right to stand as an intestate beneficiary.

²⁶⁹ *Id.* (discussing the progress of New York decisional law regarding ownership of reproduction materials).

²⁷⁰ No. 74 Civ. 3588, 1978 U.S. Dist. LEXIS 14450 (S.D.N.Y. Nov. 9, 1978) (dealing with the issue of property rights of reproductive material).

²⁷¹ *Id.* at *3.

²⁷² *Id.* at *10–11.

²⁷³ 696 N.E.2d 174 (N.Y. 1998).

²⁷⁴ *Id.* at 177.

²⁷⁵ *Id.* at 175.

²⁷⁶ See generally *supra* notes 218–31 and accompanying text (discussing *Strnad* and *Gursky*).

recommendations surrounding the issue. However, Judge Kaye did not call for legislation to resolve the issue, nor did she herself outline the appropriate means of disposition for reproductive material.²⁷⁷ Instead, the Court of Appeals merely affirmed the Appellate Division, holding that the parties' agreement directing the donation of these pre-zygotes controlled rather than expressly deciding whether or not the material should be considered property.²⁷⁸

b. New York Statutes Addressing Ownership of Reproductive Materials

Because this issue is derived from cryopreservation—one of the newest reproductive technologies—the New York Legislature has not addressed this issue in the any statute.

III. RECOMMENDATIONS

A. *Institutional Recommendations*

Though the task is daunting for any legislature to address the rights of children born out of such modern and complex procedures, the state has been given more than Surrogate Roth's recommendation for "comprehensive legislation"²⁷⁹ to work from. Both the New York State Task Force on Life and Law²⁸⁰ and the Advisory Committee on Surrogate's Court of New York²⁸¹ have proffered legislative recommendations to the state.

1. The New York State Task Force on Life and Law

In 1985, the Task Force provided an extensive set of recommendations for the Legislature, covering numerous issues arising out of reproductive

²⁷⁷ See *Kass*, 696 N.E.2d at 174 (choosing instead to issue a holding without a call for legislative reform).

²⁷⁸ *Id.* at 180 (holding that the informed consents signed by the parties sufficiently manifested their mutual intention to donate the pre-zygotes).

²⁷⁹ See *supra* note 259–62 and accompanying text (including adopted children in the intestate scheme and addressing the rights of adopted children and posthumous children as members of a class in the New York Estates, Trusts, and Powers Law); see also *supra* note 85 and accompanying text (noting that § 73 of the DRL already recognizes the rights of certain children born through artificial insemination).

²⁸⁰ NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, ASSISTED REPRODUCTIVE TECHNOLOGIES: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY (1998).

²⁸¹ 2007 N.Y. Sess. Laws A-391–92 (McKinney) (presenting the Advisory Committee on Surrogate's Court's proposed amendment to DRL § 73).

technologies.²⁸² The suggestions include regulatory recommendations pertaining to certification and licensing, embryo donation, donor screening, counseling and informing of children, along with other matters.²⁸³ However, for the purposes of this Note, only the Task Force's recommendations pertaining to legal parentage and the disposition of frozen embryos are discussed.

The Task Force recognizes that "[e]xisting New York law provides little guidance for determining the parental rights and responsibilities of individuals who participate in assisted reproductive procedures."²⁸⁴ As a remedy, the Task Force outlined paternity guidelines where a child is conceived with donor sperm and maternity guidelines where egg donation is required.²⁸⁵ The recommendation for determining paternity exactly mirrors the current DRL Section 73:²⁸⁶ It suggests that when a child conceived by donor sperm is born to a married woman, her husband should be considered the legal father if he has consented to the procedure.²⁸⁷ The recommendation as to maternity is that a "woman who gives birth to a child should be considered the child's legal mother, even if the child was not conceived with the woman's egg."²⁸⁸ Consistent with this premise, the Task Force suggests that both the genetic mother and the surrogate should have standing as "a biological parent" to seek custody and rights to the child.²⁸⁹

On the other side of this equation, the Task Force outlined instances of parental rights and responsibilities being relinquished or nonexistent. It suggested that parental rights and responsibilities should be relinquished at the time of donation of sperm, eggs, and embryos.²⁹⁰ Additionally, the

²⁸² See generally NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, *supra* note 280, at 445. These recommendations apply to issues arising out of artificial insemination, IVF, embryo transfer, and cryopreservation. *Id.*

²⁸³ See *id.* at 448–51 (noting that the recommendations to the existing New York regulations will help to clarify the application of the regulations to the use of donor eggs and embryos).

²⁸⁴ *Id.* at 445.

²⁸⁵ See *id.* (underscoring that clarity about the paternal rights for those who participate in assisted reproductive procedures is "critical").

²⁸⁶ N.Y. DOM. REL. LAW § 73 (McKinney 2008) ("Any child born to a married woman by means of artificial insemination performed by persons duly authorized to practice medicine and with the consent in writing of the woman and her husband, shall be deemed the legitimate, birth child of the husband and his wife for all purposes.").

²⁸⁷ NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, *supra* note 280, at 445 (indicating further that if the woman's husband gave his consent and the procedure was performed by a licensed physician, the donor will have no parental rights or responsibilities).

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 446. This is one recommendation made with respect to surrogacy arrangements, but there are several other recommendations. *Id.*

²⁹⁰ See *id.* at 445 (suggesting that men who donate semen should be able to relinquish rights and responsibilities notwithstanding the marital status of the woman who ultimately uses the semen).

Task Force asserted that an individual who dies before implantation of an embryo or before a child is conceived using the individual's reproductive material should not be considered a parent of that child.²⁹¹

The other prominent issue addressed by the Task Force was the disposition of frozen embryos, for which it provided a number of recommendations. Among these are the suggestions that gamete banks be required to obtain consent from the progenitors of the embryo before it is destroyed or used for research, and that the progenitors should have the power to direct the disposition of the created embryo in the event of death, divorce, or loss of decision-making capacity.²⁹² The Task Force expressly directed how the decision-making authority with respect to embryos should be divided and managed between the members of a couple.²⁹³ Additionally, it suggested that a gamete bank should ask individuals storing gametes for future use with a partner to specify instructions for the disposition of the gametes after their death.²⁹⁴ The other recommendations made with respect to the disposition of reproductive material are rooted in gamete bank regulations.²⁹⁵

2. The Advisory Committee to the Chief Administrative Judge of the Courts of the State of New York

Unlike the extensive set of recommendations offered by the Task Force, the Advisory Committee focused its recommendations mainly on the legitimacy of children born to a married couple using assisted reproduction.²⁹⁶ The Committee advised that Section 73 of the DRL, establishing the legitimacy of children born by AID to a married woman, be extended to recognize the legitimacy of children born by more advanced reproductive techniques to married women.²⁹⁷ The "advanced techniques" referred to include IVF and Gamete Intrafallopian Transfer (GIFT),²⁹⁸

²⁹¹ *Id.* at 446.

²⁹² *Id.* at 450.

²⁹³ *Id.* at 450–51.

²⁹⁴ *Id.* at 450.

²⁹⁵ *See id.* at 451 (suggesting that storage facilities establish policies for the disposition of abandoned embryos and should inform participating/donating individuals of these policies at the time the embryos are frozen).

²⁹⁶ 2007 N.Y. Sess. Laws A-391–92, at A-391 (McKinney).

²⁹⁷ *Id.*

²⁹⁸ KINDREGAN & MCBRIEN I, *supra* note 8, at 82–83. Gamete intrafallopian transfer is defined as a procedure in which an attempt is made to fertilize eggs by placing them with sperm in the fallopian tubes of the recipient woman instead of attempting *in vitro* fertilization. *Id.* The resulting embryos are then implanted in the uterus to produce pregnancy. *Id.* The procedure is generally abbreviated as GIFT. *Id.* "In contrast to IVF, GIFT does not involve fertilization ex utero." Susan Goldberg, *Of Gametes and Guardians: The Impropriety of Appointing Guardians Ad Litem for Fetuses and Embryos*, 66 WASH. L.

which both use donated eggs and sperm that may have been frozen by cryopreservation.²⁹⁹

The Committee recommended that several revisions be made to Section 73 of the DRL.³⁰⁰ First, the Committee recommended that the statute determine the legitimacy of children born to a married woman by assisted reproduction (generally).³⁰¹ Second, it suggested that the language of the statute should expressly establish the rights of such legitimate child to inherit as the legitimate and natural issue of the husband and wife by intestacy and class designation in testamentary instruments.³⁰² Third, and finally, the Committee proposed the inclusion of a provision relieving the donor(s) of parental rights, duties, and responsibilities toward the child and, accordingly, prohibiting the child from inheriting as his issue.³⁰³ Though the suggested amendments to Section 73 comprised the majority of the Committee's recommendation, the Committee also echoed the recommendation of the Task Force in suggesting, "New York law should provide that a woman who gives birth to a child is the child's legal mother, even if the child was not conceived with the woman's egg."³⁰⁴

B. The Author's Response and Recommendations

In 1985, the New York Task Force compiled its recommendation when it convened to respond to issues arising out of medical advances, including reproductive technologies.³⁰⁵ The Advisory Committee's recommendation came out in the May 2007 issue of the New York Session Laws.³⁰⁶ Thus, it is clear that the need for legislation regarding these issues has been recognized for more than two decades. However, over the last two decades, New York State has made minimal progress in responding to that need. Moreover, the only two recommendations made to the New York Legislature regarding these issues offer insufficient solutions. A more effective legislative approach would include a separate statute for each

REV. 503, 513 (1991). "After hormonal stimulation of the ovaries to produce oocytes, retrieval is accomplished via the same methods utilized for IVF. The use of GIFT procedures has become widespread in the last five years, with over one hundred infertility clinics reporting the availability of the GIFT procedure." *Id.*

²⁹⁹ 2007 N.Y. Sess. Laws, at A-391.

³⁰⁰ *Id.* at A-392.

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ See generally NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, *supra* note 280.

³⁰⁶ 2007 N.Y. Sess. Laws A-391-92, at A-391 (McKinney).

reproductive technology and would call for broad application of each statute to traditional as well as non-traditional families.

The recommendation posed by the Task Force rightly addresses issues arising out of cryopreservation—a technology that New York has barely addressed—and offers several helpful recommendations regarding the disposition of frozen embryos and the regulation of storage facilities. However, the Task Force also asserts that a woman who gives birth to a child is the child's legal mother, even if she is not genetically related to the child, which is very problematic where reproductive technologies like gestational surrogacy and embryo transfer are available. What is more problematic is that this assertion is reaffirmed by the Advisory Committee's recommendation. Based on this assertion, is one to conclude that the act of giving birth is the utmost determination of motherhood that supersedes all else . . . even if an enforceable surrogacy or an alternate reproduction agreement exists in New York?

As stated above, though Section 123 of the DRL³⁰⁷ effectively prohibits surrogacy contracts, and Section 122³⁰⁸ asserts that they are against public policy, in practice, the surrogacy procedure is generally still lawful where it is not part of a compensation agreement. Thus, this maternity assertion is especially problematic because of the capacity of several reproductive technologies to split the dual roles of gestational and genetic motherhood between two women. Consider the situation in which an infertile woman has opted to have a child, lawfully, through gestational surrogacy or embryo adoption.³⁰⁹ If the Task Force recommendation were accepted, the woman seeking to have this child, who is neither the genetic mother nor the gestational mother of the child, could potentially have the fewest parental rights to that child. This scenario demonstrates the need for pliable laws that consider and reflect each reproductive technology, its procedures, and its individual implications.

Though the Advisory Committee's proposed amendment to Section 73 of the DRL does expand the current law to apply to reproductive technologies in general, a mere amendment to Section 73 is not an adequate legislative approach for responding to these issues for two reasons. First, as demonstrated by the gestational surrogacy example above, different technologies implicate the law in different ways and must therefore be

³⁰⁷ N.Y. DOM. REL. LAW § 123 (McKinney 2008) (providing civil penalties for the creation of a surrogacy contract for any compensation other than medical expenses).

³⁰⁸ N.Y. DOM. REL. LAW § 122 (McKinney 2008) (stating that such contracts are void and unenforceable).

³⁰⁹ See *supra* notes 36–38 and accompanying text (discussing embryo transfer).

regulated individually. In further support of this assertion, consider a married woman inheriting her deceased husband's cryogenically frozen sperm, which he expressly intends for her to use to produce his child. She is artificially inseminated with the sperm after his death and has his child. Technically the sperm used belongs to her husband; but, since he is deceased, should the sperm be considered donor sperm? If so, the woman has her deceased husband's consent required under proposed Section 73, but is she still considered married after his death? Would this child be considered his legitimate issue? If the child was born many years after his death, should he still be considered his issue? A thorough legislative scheme, specifically addressing cyropreservation, would provide answers to all of these questions.

The second shortcoming of the amended Section 73 is that it only applies to married individuals. Part of what is so appealing about alternative reproductive approaches, for many, is the ability to reproduce outside of the traditional heterosexual married unit. Moreover, New York courts have interpreted DRL Section 117 to allow both heterosexual singles and homosexual partners of birth parents to adopt children.³¹⁰ Why then, should these individuals be deprived of the ability to conceive their own child? Such a law may be considered discriminatory, in depriving certain individuals of their constitutional right to procreate based on their marital status or their sexual preference. Though the Court has not specifically addressed the constitutional right of homosexual individuals to procreate, in *Skinner v. Oklahoma*,³¹¹ the U.S. Supreme Court asserted in dicta that the right to reproduce is "one of the basic civil rights of man,"³¹² and this assumption prevails today.

Thus, an effective legislative scheme for addressing the many legal issues raised by reproductive technologies will include specific statutes for each reproductive technology that apply to married individuals and single individuals who are either heterosexuals or homosexuals. A broad application of these statutes would allow each reproductive technology to be considered within each of the different "familial" circumstances in which it may be employed. Such an applicable and thorough legislative scheme would ease the burden of the courts in deciding cases involving

³¹⁰ See *supra* notes 202–09 and accompanying text (describing the case of *Karin T. v. Michael T.*, in which petitioner was married to a person living as a man, though formerly a woman, and petitioner argued that she was not responsible for supporting children she was not biologically related to nor had she adopted).

³¹¹ 316 U.S. 535 (1942).

³¹² *Id.* at 541 (1942); Coleman, *supra* note 8, at 61.

reproductive technologies, would result in consistent treatment of the issues they raise, and would allow the accessibility and success of reproductive technologies to continue to grow.

CONCLUSION

Recent rapid advances in reproductive technology have challenged the law's ability to evolve at a similarly rapid pace. New York is among the many states that have neither legislatively nor decisionally addressed many of the issues that arise out of reproductive technology. Though some may question whether the possibilities offered by reproductive technologies outweigh the problems, the fact is that these procedures have and will continue to change the traditional family. It is time for the law to release tradition and respond to change. Ideally, the response to these issues should come from the legislature, so as to ease the burden on the courts and to resolve these issues more expediently. An effective legislative scheme for the New York Legislature to adopt will include a series of non-discriminatory statutes—applicable to all individuals regardless of marital status or sexual orientation—that individually address each reproductive technology and its legal implications. Such legislation will clarify, if not resolve, the inheritance and legitimacy issues that arise out of assisted reproduction and the various reproductive technologies through which it is employed.